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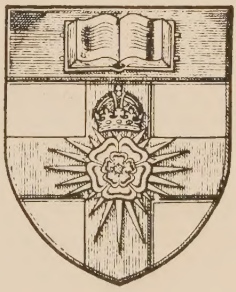

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1927.—VOL. I.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET, LONDON, W.C. 1,

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PRINTED BY W. SPEAIGHT & SONS, LTD., 98-99, FETTER LANE, LONDON, E.C.4.

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re STEPHENS.

TOMALIN *v.* TOMALIN'S TRUSTEE.

C. A.
1926.
June 11, 14.

[1925. S. 5042.]

Will—Construction—Gift in Remainder to Children as a Class at Twenty-one, but Whole to one Child if only one Child living at Death of Parent—Survival of more than one Child—Reflecting back Contingency.

Testator, who died in 1876, by his will, dated in 1871, devised and bequeathed his residuary real and personal estate to his trustees upon trusts to sell and convert and to hold the income of the proceeds upon trust for his son and daughters for life in equal shares, and after their respective deceases "upon trust to pay or transfer the share from which such income arose of each such son and daughter unto and equally among his or her children who shall then have attained or shall thereafter attain the age of twenty-one years, or in case there should be but one such child then living upon trust to pay or transfer the same to such only child on his or her attaining that age." The testator left one son and six daughters surviving him. Amongst the daughters was Mrs. L. T., who died in 1925, having had six children, one of whom died in infancy; five lived to attain the age of twenty-one years, but one, A. E. T., after attaining the age of twenty-one years, died in 1915, in his mother's lifetime:—

Held, that there was no necessity for reflecting back the contingency in the latter part of the gift of the child surviving the mother into

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the earlier part of the gift, and therefore that all the children of Mrs. L. T., who attained the age of twenty-one years, became entitled to an absolute vested interest in the capital of Mrs. L. T.'s settled share original as well as accruing in the testator's residuary estate irrespective of whether or not they survived her.

Principle stated by Lord Shand and Lord Davey in *Hickling* v. *Fair* [1899] A. C. 15, 27, 35 applied.

In re Firth [1914] 2 Ch. 386 and *In re Walker* [1917] 1 Ch. 38 approved and followed.

Selby v. *Whittaker* (1877) 6 Ch. D. 239 distinguished.

Decision of Eve J. reversed.

APPEAL from a decision of Eve J.

Thomas Stephens of Woburn Lodge, Loughborough Park, Surrey, by his will, dated July 29, 1871, after appointing executors and trustees thereof devised and bequeathed unto them all his real and personal estate upon trust for sale and conversion as therein mentioned and directed them to stand possessed of his said real and personal estates and the net moneys to arise from the sale thereof and to invest the same as therein mentioned for the benefit of all his children "who may be living at the time of my decease and the issue of such of them as may be then dead such issue taking their parents' share only in manner following that is to say to pay the income of one equal share thereof unto my son Joseph Stephens for his own absolute use and benefit for his life And as to the shares of the income payable to my daughters to pay the same to each such daughter for her life for her sole and separate use and benefit free from the debts control or engagements of her then present or any future husband And I declare that her receipts alone for the same shall be the only good and sufficient discharges for the same notwithstanding her coverture And on the respective deceases of my said son and daughters upon trust to pay or transfer the share from which such income arose of each such son or daughter unto and equally among his or her children who shall then have attained or shall thereafter attain the age of twenty-one years or in case there shall be but one such child then living upon trust to pay or transfer the same to such only child on his or her attaining that age And in case any or either of my said son and daughters should die without leaving issue or leaving such, such issue should all die

under the age of twenty-one years then I direct that the share or shares of any such son daughter or daughters shall fall into the residue of my estate and be disposed of according to the existing trusts thereof Provided always that in case any of my daughters should die leaving issue under the age of twenty-one years and leaving a husband her surviving I direct my trustees to pay to such husband the dividends of the share of such issue during their respective minorities And I direct my trustees to apply all or any part of the yearly income to which under the preceding trusts any infant legatee shall be presumptively entitled (except as aforesaid) in or towards the maintenance and education or otherwise for the benefit of such legatee during his or her minority and to invest and accumulate any unapplied income and add the same to the respective shares whence the same shall have arisen with power to have recourse to the same in any subsequent year or years if they shall think fit."

The testator died on November 6, 1876, and his will was proved by all the executors therein named.

The testator had issue eight children only—namely, a son Thomas (who died on June 20, 1868, leaving three children, all of whom survived the testator and attained twenty-one years of age), and his said son Joseph and six daughters, all of whom survived the testator, including Sarah, who married Edward Winbush, and Louisa Victoria, who married George Tomalin.

On May 21, 1908, the then trustees of the will took out an originating summons (*In re Stephens. Johnston* v. *Winbush* [1908. S. 1880]) in order to enable them to distribute the share of Sarah Winbush, whereby they asked the Court to determine whether upon the true construction of the will and in the events which had happened the children of Sarah Winbush who attained the age of twenty-one years became equally entitled to the capital of her settled share original as well as accruing in the testator's residuary estate or whether only such children of Sarah Winbush as survived her and attained twenty-one years became so entitled.

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The defendants to the summons were the children of Sarah Winbush and persons claiming under them.

By an order made on the summons by Eve J. on November 19, 1908, the Court declared that according to the true construction of the will and in the events which had happened such children only of Sarah Winbush as survived her and attained the age of twenty-one years became entitled to the capital of her settled share under the testator's will original as well as accruing.

Louisa Victoria Tomalin had six children only—namely, George Stephens Tomalin, Arthur Edward Tomalin, Ernest Victor Tomalin, Louisa Kate Dear, Gertrude Edith Rose and Frank Harry Tomalin. All these children attained the age of twenty-one years except Frank Harry Tomalin, who died in infancy on February 9, 1871. All the other children survived their mother except Arthur Edward Tomalin, who died on January 23, 1915.

Louisa Victoria Tomalin died on February 11, 1925.

George Stephens Tomalin was adjudged bankrupt on October 23, 1903, and obtained his discharge on January 29, 1906. A trustee in bankruptcy of his estate was duly appointed, and the official receiver in bankruptcy as ex officio trustee claimed his share in the testator's estate.

By deed dated March 7, 1907, Arthur Edward Tomalin and his assign one Amy Ethel Rowan sold and assigned to the General Reversionary and Investment Co., Ld., all and singular the share or shares part or parts to which he, Arthur Edward Tomalin, was entitled as one of the children of Louisa Victoria Tomalin in certain investments then standing in the names of the trustees of the will and in all other if any of the investments and property for the time being subject to the trusts of the will, and all other, if any, the share and interest whatsoever of Arthur Edward Tomalin in under and by virtue of the will of and in the investments and property for the time being subject to the trusts thereof subject to the prior life interest or interests affecting the same under the will.

The General Reversionary and Investment Co., who were not parties to the summons taken out before Eve J. in 1908,

required the present surviving trustee of the will to issue a further originating summons for the determination of the same questions as were dealt with by the former summons.

The present summons was accordingly taken out on December 24, 1925: (1.) to have it determined whether upon the true construction of the will and in the events which had happened the children of Louisa Victoria Tomalin who attained the age of twenty-one years became equally entitled to the capital of her settled share original as well as accruing in the testator's residuary estate or whether only such of her children as survived her and attained the age of twenty-one years became so entitled, and (2.) so far as necessary execution of the trusts of the will so far as regarded the settled share of Louisa Victoria Tomalin.

The summons was heard before Eve J. on March 18, 1926, who followed his original decision in 1908, and declared that such children only of Louisa Victoria Tomalin as survived her and attained the age of twenty-one years were entitled to the capital of her settled share under the testator's will original as well as accrued.

The General Reversionary and Investment Co., which was one of the defendants to the originating summons, appealed. The appeal was heard on June 11 and 14, 1926.

Luxmoore K.C. and *Edward Beaumont* for the appellant company. There is here a plain gift to a class at twenty-one which is not subject to any contingency. Each member of the class therefore on attaining twenty-one takes an absolute vested interest in Mrs. Tomalin's share. No doubt in some cases a contingency in a latter part of a gift has been read back into the earlier part of the gift, but this should not be done unless it is necessary to do so: *Hickling* v. *Fair* (1); *Templeman* v. *Warrington* (2); *Kimberly* v. *Tew* (3); *In re Firth* (4); Jarman on Wills, 6th ed., vol. ii., pp. 1366, 1369. In *Hickling* v. *Fair* (1) Lord Davey said: "It is an elementary principle in the construction of wills that a gift to a class after a life interest

(1) [1899] A. C. 15, 35.
(2) (1842) 13 Sim. 267.
(3) (1843) 4 D. & War. 139.
(4) [1914] 2 Ch. 386.

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or life-rent includes all persons within the description of the class who were alive at the testator's death, or have come into being during the lifetime of the life tenant or life-renter. . . . . I think it is equally clear that when the gift is made to depend on the happening of a contingency, that contingency is not imported by implication into the description of the class so as to confine the gift to those members of the class who survive the contingency." Those two rules apply in the present case. *Templeman* v. *Warrington* (1) is very like the present case. Shadwell V.-C. there stated that "the rule is not to import, into an instrument, more of contingency than is expressed in it." That case has never been disapproved of in any of the text-books. The general rule is that divesting clauses are to be strictly construed: see Jarman on Wills, 6th ed., pp. 1366, 1368.

[SARGANT L.J. referred to Theobald on Wills, 7th ed., p. 593.]

The Court always leans to a construction which will give vested interests to the children, and thus let in all the class, for whom it must have been the intention of the testator to provide: *Kimberly* v. *Tew.* (2) The appellant's contention is entirely supported by *In re Firth* (3) and *In re Walker* (4); see also *Boulton* v. *Beard.* (5)

The only safe rule to follow in the present case is to give the words of the gift their ordinary accepted construction. There are no special circumstances in the will which require any interference with the words of the original gift.

[SARGANT L.J. referred to Hawkins on Wills, 3rd ed., p. 259.]

It is submitted therefore that the child who attained twenty-one but died in his mother's lifetime took an absolute vested interest and that those claiming under him are entitled to it.

A. Adams for the trustee in bankruptcy of G. S. Tomalin. It is submitted that the judgment of Eve J. was right, and that Mrs. Tomalin's share is divisible into fourths and not fifths.

(1) 13 Sim. 267, 270.
(2) 4 D. & War. 139, 150.
(3) [1914] 2 Ch. 386.
(4) [1917] 1 Ch. 38.
(5) (1853) 3 D. M. & G. 608, 612.

There are, it is submitted, three indications in the will that the testator intended that only children who survived the mother should take.

First, the gift included not only children who should have attained twenty-one at the death of the mother, but also children who should thereafter attain that age, and the last mentioned children could only do so if they survived their mother. The class, therefore, was one some members of which could only participate if they survived the mother. Secondly, if there was only one child who survived the mother, that child was admittedly to take the whole. Thirdly, the gift over in favour of the residue was to take effect only if the mother died without leaving issue, which, it is submitted, means leaving issue at her death. It is submitted that the scheme throughout was to provide for children who should survive the mother, and for them alone, and that is a more consistent and reasonable arrangement than that for which the appellants contend.

In *In re Firth* (1) there was nothing in the will to show that the gift to the children of the son was contingent on their being alive at the son's death. The same applies to *Templeman* v. *Warrington* (2) and *Kimberly* v. *Tew*. (3)

[WARRINGTON L.J. I cannot see in the present will any indication in the original gift of contingency except that of attaining the age of twenty-one years.]

In *Smith* v. *Vaughan* (4), where the gift was in somewhat similar terms to that in this case, it was held that it was merely contingent during the mother's life. There is no doubt that in *Kimberly* v. *Tew* (3) Lord St. Leonards did not approve of *Smith* v. *Vaughan* (4), but it is submitted that that case was correctly decided.

Jenkins K.C. and *Wilfrid Hunt* for the respondent Mrs. Dear. The question is whether there is any rule which prevents the Court from giving effect to the ordinary terms of the gift. We rely on the word "then" in the gift. The clause itself predicates the existence of a live hand to receive.

(1) [1914] 2 Ch. 386.
(2) 13 Sim. 267.
(3) 4 D. & War. 139.
(4) (1720) 8 Vin. Abr. 381, pl. 32.

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Selby v. *Whittaker* (1) illustrates the particular weight given by judges to the language of a clause like the present. The case is not claimed as a decision in the respondent's favour. In *Hickling* v. *Fair* (2) there was a difference of opinion among the judges.

It is submitted that the intention of the testator was to benefit all his grandchildren who attained the age of twenty-one years and survived their mother: see *Young* v. *Turner*. (3)

[WARRINGTON L.J. I cannot see what that case has to do with what we have to decide.]

J. E. Harman for the surviving trustee.

Luxmoore K.C. in reply.

LORD HANWORTH M.R. This is an appeal from a decision of Eve J. as to the interpretation which is to be placed upon the will of Thomas Stephens of Woburn Lodge, Loughborough Park, Surrey. The short facts are these. The testator made his will on July 29, 1871, he died on November 6, 1876, and probate of his will was granted on December 2 of the same year. He left a son and six daughters surviving him, and among the daughters was one, Louisa, who was married to George Tomalin. Mrs. Tomalin had six children, one of whom died in infancy; five of them lived to reach the age of twenty-one years, but one of them, Arthur Edward, after reaching that age, died on January 23, 1915.

The testator made provision for his son and for his daughters, Louisa Tomalin, of course, being one of them, and the terms of his will are these: "As to the shares of the income payable to my daughters to pay the same to each such daughter for her life. . . . . And on the respective deceases of my said son and daughters upon trust to pay or transfer the share from which such income arose of each such son and daughter unto and equally among his or her children who shall then have attained or shall thereafter attain the age of twenty-one years or in case there should be but one such child then living upon trust to pay or transfer

(1) 6 Ch. D. 239, 245. (2) [1899] A. C. 15.
(3) (1861) 1 B. & S. 550, 557.

the same to such only child on his or her attaining that age." Mrs. Louisa Tomalin died on February 11, 1925, leaving only four surviving children. The question which arises is whether or not the representatives of Arthur Edward Tomalin, who attained the age of twenty-one years but died in his mother's lifetime, are to share with the four other children in the share which passed to Mrs. Tomalin under the terms of her father's will, or whether only the four children of Mrs. Tomalin who survived her are entitled; in other words, the question is whether the provision made in the will for Mrs. Tomalin is to be divided into fourths or into fifths.

It is not disputed that if one takes the terms of the first part of this clause: "And on the decease of my daughter upon trust to pay or transfer the share from which such income arose of such daughter unto and equally among her children who shall then have attained or shall thereafter attain the age of twenty-one years," and if one stops there, such of the children of Mrs. Tomalin as attained the age of twenty-one years took a vested interest in their mother's share. But it is said that by reason of the subsequent words: "Or in case there should be but one such child then living upon trust to pay or transfer the same to such only child on his or her attaining that age," another contingency is added to the contingency of their reaching twenty-one years, so that in order to become entitled they had not only to attain the age of twenty-one years, but also to survive their mother, Louisa Tomalin. It is contended by the appellants that the contingency of surviving the tenant for life, their mother, is not added to the contingency of their reaching twenty-one years.

The appeal comes to us from Eve J., who decided this matter in accordance with a decision which he had given upon the same will in the year 1908, and I understand that he adopted the construction he then put upon the gift in 1908 without adding to it when the matter was before him on the present occasion. I say that in particular, because it is important to bear in mind that in 1908 Eve J. could not have had the advantage of considering two cases which have

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been decided since that date, one by Sargant J. in *In re Firth* (1) and the other by Younger J. in *In re Walker*. (2)

The point is an important one, and it has been fully argued by those who are concerned either in dividing the interest into fourths or in dividing the interest into fifths. I go back to the first part of the clause which I have read, which imposes the limitation that the child shall have attained the age of twenty-one years. If that be so, then there are five of the children of Mrs. Tomalin who reached that age, and it is clear that upon their so reaching that age the interest from their mother became vested in them. Is it essential that by reason of the subsequent words one should add to the first contingency a second contingency, and say that the total effect of the clause is that the child must attain twenty-one years and also outlive the mother, Louisa Tomalin ?

A number of cases have been cited to us, but I am not going to refer to more than two or three of them.

In *Templeman* v. *Warrington* (3), a case which has a strong bearing on the present, Shadwell V.-C. said : " Then the rule is not to import, into an instrument, more of contingency than is expressed in it ; and as the event which the testatrix contemplated, namely, that there might be only one child living at the death of her niece, has not happened, I am of opinion that the vested interests which the children took, were not divested by their dying in the lifetime of their mother." In the present case it is clear that if the interpretation which was given by Eve J. is accepted in this Court the effect of it will be that although all five children had taken what would appear to be vested interests, on their attaining twenty-one years, the interest of one of them, Arthur Edward, would become divested upon his failing to outlive his mother. If one looks at what one may call the reasonableness of the case it seems a little difficult to suppose that a man who had reached certainly twenty-one years, if not more, at the time of his death in 1915, and would have been at the time of his mother's death thirty-one, was because he died at the age

(1) [1914] 2 Ch. 386. (2) [1917] 1 Ch. 38.
(3) 13 Sim. 267, 270.

of thirty-one to lose the interest which he would have enjoyed jointly with his brothers and sisters because of the imported second contingency which he had not fulfilled—namely, living longer than his mother. The principle stated by the Vice-Chancellor in those words that I have read is that it is important not to read into an instrument more of contingency than is expressed in it.

The other case to which I desire to refer is *Kimberly* v. *Tew*. (1) In that case Sir Edward Sugden delivered not a judgment but his opinion upon a matter which had been fully argued, and it is a case in which distinctions can be drawn. As I say, it is not a definite decision. As reported he said (2): "In all cases like this of gifts to children, the Court is anxious to give vested interests to children who have died in their parents' lifetime; for where a fund is left to a father for life, with remainder to his children, the children, looking to that fund as a future provision for their families, marry in the lifetime of their father; and the Court is unwilling that their children should be afterwards deprived of that provision by the accident of their death in their father's lifetime."

The first of those cases illustrates a principle and the second case a reason why you are not entitled to import contingencies unnecessarily. In 1898 there was a decision in the House of Lords in *Hickling* v. *Fair*. (3) True it is a majority decision, as has been pointed out, but the decision is that of Lord Shand, Lord Davey and Lord Halsbury, though it was differed from by Lord Watson and Lord Herschell. The appeal was from the Second Division of the Court of Session. It is, I think, plain from what Lord Halsbury says that he had read and entirely concurred in the judgments which were delivered by Lord Davey and Lord Shand. The case therefore is of great authority, and is binding on this Court. Lord Shand in his judgment states a principle which is in accord with the two decisions I have referred to. He says (4): "Another principle which

(1) 4 D. & War. 139.
(2) Ibid. 150.
(3) [1899] A. C. 15.
(4) Ibid. 27.

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it is of importance to bear in mind in the determination of this case is that, although the bequest may be dependent on a contingency, this will not necessarily prevent the vesting. The time at which the contingency happens in a bequest to a class does not determine the vesting in the individuals composing the class. If the contingency should apply to the individual and relate to his capacity to take, as, for example, a bequest left subject to the condition that the legatee should attain the age of twenty-one years, there can be no vesting till he or she shall reach that age; but where the contingency applies to a class, and not as a condition of the capacity of the legatee to take, the contingency is not to be imported into the constitution of the trust so as to suspend vesting till the death of the life-renter." Lord Davey says (1): "It is an elementary principle in the construction of wills that a gift to a class after a life interest or life-rent includes all persons within the description of the class who were alive at the testator's death, or have come into being during the lifetime of the life tenant or life-renter." That principle is in accord with the two cases to which I have referred, and appears to me strongly to support the view that when once the first contingency is fulfilled we ought to endeavour not to import a second contingency which would prevent the interest which would have become indefeasible, if the words remained alone, from becoming divested by the subsequent words.

It is said that if one takes this contingency: "Or in case there should be but one such child then living upon trust to pay or transfer the same to such only child," it is a capricious way for the testator to deal with his property; but it appears to me even more capricious to say that those of his daughter's children who have attained the age of twenty-one years or more should have their interests divested by this second condition which is imposed upon them—namely, that they should outlive their mother.

The law being as I have indicated by these cases to which I have referred, we have two subsequent cases, the one decided in 1914 and the other in 1917. Both are in the same direction,

(1) [1899] A. C. 35.

but it is sufficient for me to refer to *In re Firth* (1), which was before Sargant J., and to quote the last paragraph of his judgment: "It seems to me that it would be safer for me to act on the well-established rule that, prima facie, interests are to be taken to vest at as early a period as possible, and not to give to words which are substantially, as it seems to me, divesting words any further operation than is necessitated by the actual terms of the divesting provision." It seems to me that the principle so applied in that case is the right principle, and that we ought to apply it in this case. It is easy to found an argument by a speculation as to what the testator ought to have done or what somebody else says is capricious, but it is impossible to find one's way among the different caprices which one may suppose existed or did not exist in the minds of testators. One has to take the words as they stand, and inasmuch as in this particular will it seems that upon the contingency of attaining the age of twenty-one years being fulfilled the interest became vested, it is unnecessary and, in accordance with the principle to which I have referred, wrong to import a further contingency that the child should be living at the date of the death of the tenant for life.

I will only say one word about *Selby* v. *Whittaker* (2), which has been referred to. It is important that the actual terms of the will which had there to be construed should be borne in mind. The will contained this provision: "But nevertheless the said parts or shares of the said child or children of and in the said principal trust moneys shall be absolute vested interests in him, her, or them immediately on the decease of his, her, or their respective parent or parents." Jessel M.R. said (3): "There can be nothing better settled than that when a testator directs that an interest is to be vested at one time, he means that it is not to be vested at any other time. That is the literal meaning of the words, and we should do violence to their meaning if we held that the interests were vested at any other time." Having regard

(1) [1914] 2 Ch. 386, 394. (2) 6 Ch. D. 239.
(3) Ibid. 247.

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to the actual terms of the will there, which provided that the shares were to vest on the death of the parent, and excluding the vesting at any other time, it appears to me that that case does not govern the present, and it is not an authority which compels us to decide otherwise than in accordance with *In re Firth* (1) and *In re Walker*. (2) For these reasons I think the appeal should be allowed. As I have said, inasmuch as Eve J. in the present case merely followed his decision of 1908, in allowing the appeal we are not really differing from the decision of Eve J. of 1926, but differing from the decision of 1908, given at a time when he had not the advantage of reading some of the authorities to which we have been referred.

WARRINGTON L.J. I am of the same opinion. Eve J. has held that there ought to be excluded from those entitled to participate in the share of the testator's estate, to the income of which Mrs. Tomalin, his daughter, was entitled, those who claim under a child of Mrs. Tomalin who died in his mother's lifetime. Those persons appeal, and in my opinion the appeal succeeds.

The gift which we have to interpret is in these words, putting them in the form of the concrete case: "On the death of Mrs. Tomalin the trustees are to pay or transfer the share from which her income arose unto and equally among her children who shall then have attained or shall thereafter attain the age of twenty-one years or in case there shall be only one such child then living, then upon trust to pay or transfer the same to such only child on his or her attaining that age." I need not read any more. It will be observed that that trust divides itself into two parts. First, a trust for the children of Mrs. Tomalin attaining twenty-one years, and, second, a gift to one individual child in case there should be only one child living at her death.

I quite agree that there is no absolute rule of law or principle of construction which compels the Court to give one or other of the two conflicting meanings to the provisions of this will;

(1) [1914] 2 Ch. 386. (2) [1917] 1 Ch. 38.

one has to look at the words of the will and see what those words mean. Of course, you read the will as a lawyer and you do not read it, to use Mr. Jenkins' expression, as the man in the street would read it. The will contains certain expressions which have legal import, and to those you must give their meaning. In this particular case at all events it seems to me that there is no rule or principle of law which compels one to accede to the arguments on the one side or the other. The only principle of law is, what is meant by the expressions used by the testator ?

Without referring to any authorities to begin with I will simply take the words. I said that the gift was divided into two parts. So it is ; but, of course, each part does not act by itself, and you have to look at both parts to see what the testator meant. In the first part of it there is no question at all to my mind that no contingency as to the time at which any particular child of Mrs. Tomalin should be living is expressed ; it is simply a gift to all the children of Mrs. Tomalin who attained twenty-one years, whether in her lifetime or after her death. If there were nothing else then each of those children would on attaining twenty-one years obtain an absolute vested interest. The second part contains another contingency. It is a gift in this case of the whole of the share to one particular child if that child satisfied a certain condition—namely, that he or she shall be living at the time of the mother's death. What is attempted to do is to read back into those words which contain an absolute vested gift to a class, this special contingency, which is to give effect to a gift to the individual.

In my opinion there is nothing which compels one to go back. The authorities, if one has to depend on authorities, are to the contrary effect. There have been certain cases where a contingency attached to the taking effect of a gift to a class has been held to determine the ascertainment of the members of the class. There have been such cases, but when one comes to examine them it is found that there was always something in the will, some indication of an intention, which enabled one to import into an unconditional gift the condition which

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appears in a subsequent gift. In the present case I can find nothing at all. The first gift is clear and the second gift is clear. The contingency in question is a contingency on the happening of which the second gift is dependent, and if that contingency does not happen it seems to me that you can take that second gift out of the will altogether and let the first gift take its effect.

A good deal has been said, I think quite rightly said, about the statements of Lord Davey and Lord Shand in *Hickling* v. *Fair* (1); but I think it is right to say that although the principle enunciated by those two learned Lords helps one in construing this particular gift it is not directly applicable to this case. Lord Davey (2) cites with approval the passage in the judgment of Turner L.J. in *Boulton* v. *Beard* (3), in which he said: "The first argument in support of a different construction is that the bequest to the children of Catherine Rayner being only given in the contingent event of her leaving issue, therefore only the children who were living when the contingency happened would take." Then he proceeds to negative the application of any such construction to the will in question. It will be observed that he is dealing with the importation into the description of the class entitled under a gift the contingency applicable to the gift itself. In this case we have no such contingency. There is no contingency at all in the gift itself, and it takes effect simply on the death of the testator's daughter; but I think the line of reasoning which prevents one from importing into the description of a class taking under a gift a contingency applicable to the gift itself is applicable to the present case, where it is attempted to import into the description of a class a contingency applicable to, and on which depends, a gift to one of the individuals originally composing that class. I think it right just to point that out, because those statements, though not absolutely in point, are in point, because they assist one in arriving at the proper

(1) [1899] A. C. 15. (2) [1899] A. C. 35.
(3) 3 D. M. & G. 608.

construction. But they are dealing with a rather different matter.

In my opinion this case is one in which the natural and ordinary construction of the words of the gift to the children can take effect, and there is not sufficient indication of another intention to import the additional contingency or condition of a child surviving the mother. With all respect to Eve J. I think his previous decision was not correct, and that his judgment in the present case following that previous decision must be reversed and the present appeal allowed.

SARGANT L.J. I am of the same opinion. We have here to deal with an alternative gift in two alternative events, and the event which has happened is that to which the first branch of the alternative gift applies. That branch is in these words: "Unto and equally among his or her children who shall then have attained or shall thereafter attain the age of twenty-one years." In my judgment, looking at that branch of the alternative alone, there can be no question but that that gives an absolutely vested interest to any child who attains the age of twenty-one years, whether that child survives the parent or not. Then we have, of course, to consider the context, and for that purpose to look at the second branch of the alternative gift, which is in these terms: "or in case there should be one such child then living upon trust to pay or transfer the same to such only child on his or her attaining that age." The case strictly is not one of divesting a vested interest at all, though those terms may be used with regard to it, as I think they have been in some cases, without great impropriety; but it is a question of whether you are to so construe the gift which is prima facie vested as, by aid of the context, to turn it into a contingent gift.

Here there is no doubt that under the second branch of the alternative (the gift to the one child should a son or daughter have only one child who fulfils the qualification of attaining twenty-one years) the gift is contingent. The question is: Are we to read that contingency back into the original gift? It is precisely put in Theobald on Wills,

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7th ed., p. 593, as a question of reflecting contingency backwards, and in Jarman on Wills, 6th ed., p. 1389, it is put in this way: "Where there is a gift to a class of persons in remainder, the general rule that all members of the class who come into existence during the particular estate, take vested interests, may be displaced by the context." What we have to consider is whether that context of the second branch of the alternative is sufficient to displace the prima facie meaning of the words in the first branch of the alternative.

I do not propose to say much on that question, because I did very fully consider an extremely similar case in *In re Firth* (1), and dealt with the authorities down to date, and after having heard this case fully argued to-day I see no reason to differ from the conclusions as to the authorities and the result of them which are arrived at in that case. I am glad to find that there has been a subsequent case, *In re Walker* (2), decided by Younger J., which seems to me to tend in the same direction as *In re Firth.* (1)

There is in the present case this further circumstance, that there is a subsequent gift over in case a child does not leave any issue. It seems to me immaterial to consider whether in such a case the word "leaving" would be construed "having left" or not, because if you are not to reflect back the contingency expressed in the gift should there be but one child, I can see no reason for reflecting back any contingency, if there is such a contingency in the gift, should there be no child at all who attained the age of twenty-one years. In my opinion we ought not to reflect back into the plain words of the gift any words of subsequent contingency to any greater extent than we are forced to do by the terms of the will itself. The terms of the first alternative gift, though they would cover the case of a single child, have to be modified, so that in the case of a single child the gift shall be contingent, because of the express words dealing with that contingency. But it seems to me that it would be a wrong view to hold that that contingency

(1) [1914] 2 Ch. 386. (2) [1917] 1 Ch. 38.

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is in the same way to be reflected back into the gift to children should there be more than one child attaining the age of twenty-one years, particularly as that would have the effect of making the provision for the children of the child of the testator less secure than it would otherwise be or than one would naturally expect that the testator, had his attention been called to the contingency, would have intended to make it.

I feel that here we are really following the plain terms of the gift of the will itself and merely declining to import into them a contingency more extensive than that which the will itself has expressed.

Appeal allowed.

Solicitors: *Peacock & Goddard; Tarry, Sherlock & King; Hanbury, Whitting & Ingle, for W. M. Pybus & Sons, Newcastle-upon-Tyne.*

W. I. C.

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In re DEBTORS.

[669 of 1926.]

Bankruptcy—Petitioning Creditor's Debt—Unliquidated Sum at Date of Act of Bankruptcy but liquidated at Date of Petition—Whether good Petitioning Creditor's Debt—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 4.

In order to constitute a good petitioning creditor's debt the debt must be a liquidated sum, payable either immediately or at some certain future time at the date of the act of bankruptcy. It is not sufficient that the debt should have become a liquidated sum in the interval between the date of the act of bankruptcy and the presentation of the petition.

Dicta in *Moss* v. *Smith* (1808) 1 Camp. 489; *Ex parte Charles* (1811) 14 East, 197, 205; *Ex parte Hayward* (1871) L. R. 6 Ch. 546, 548, 549; *Ex parte Muirhead* (1876) 2 Ch. D. 22, 25; *In re Whelan* (1878) 48 L. J. (Bank.) 43, 44 followed.

Statement in Williams' Bankruptcy Practice, 13th ed., p. 42, that "By what may be called the Common Law of Bankruptcy, it has always been held that the petitioning creditor's debt must have accrued due before the act of bankruptcy on which it is intended to found the petition (*Moss* v. *Smith*, 1 Camp. 489); but the debt need not have been due to the petitioning creditor at the date of the act of bankruptcy" approved of as a correct statement of the law.

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APPEAL by the debtors from a receiving order made against them by Mr. Registrar Francke on June 30, 1926.

The following statement of facts is taken from the judgment of the Master of the Rolls :—

The debtors are members of the Rubber Trade Association of London, and in April, 1926, there was a considerable fall in rubber values, the debtors at that time having a number of outstanding contracts with the petitioning creditors. The debtors in consequence of the fall arranged with the manager of their bank that certain cheques given by them, which were eight in number, should be honoured. Four of those cheques were issued and duly paid on April 15, 1926, but on April 16 the four remaining cheques were dishonoured, and among them a cheque for 218*l.* 17*s.* 3*d.* in favour of the Rubber Settlement House, which was connected with and formed part of the Association. On April 17, the Rubber Settlement House received notice of dishonour of their cheque, in consequence of which they required the debtors to suspend payment. Accordingly on April 17, 1926, the debtors wrote to the petitioning creditors as follows : " We very much regret to inform you that we have been compelled to cease payment. A meeting of brokers concerned is being called at the Rubber Trade Association on Monday, the 19th April, at 3 P.M." That was the act of bankruptcy relied upon.

By the Bankruptcy Act, 1914, s. 1, sub-s. 1, it is provided that " A debtor commits an act of bankruptcy in each of the following cases . . . . (*h*) If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts." The notice which I have read would therefore clearly be an act of bankruptcy by the debtors.

Among the regulations which have to be observed by members of the Association is included a rule (No. 12) which is as follows : " . . . . It is a fundamental rule of the Association that if a receiving order be made against a member or upon any member becoming insolvent, compounding or making any arrangement with his creditors or suspending payment

or if, in the case of a company which is a member, the company becomes commercially insolvent, or if in the opinion of the committee a member, whether a company or not, becomes a defaulter, every outstanding contract for rubber of such member in existence on the day of such receiving order, insolvency, arrangement, composition, liquidation, suspension or default shall be closed at the market price of the day as certified by the committee, and the net differences only which shall thereupon be found due as between such member and the other members of the Association shall be paid or payable." Both the petitioning creditors and the debtors, being members of the Association, were therefore bound by that rule.

It is clear from the transaction that on April 17 the debtors had become defaulters, and in accordance with the rule the committee of the Association were then brought into action, and the contracts between the debtors and the petitioning creditors were to be closed at the market prices ruling on April 17, the day on which the debtors became defaulters. But what the market prices were, which were to determine the amount of the liability of the debtors, was to be certified by the committee, and the net differences only were then to be payable.

As the notice of the suspension had come to the knowledge of the Association the action of the committee became necessary to determine what sum was due from the debtors to the petitioning creditors, and on April 20, 1926, the committee, acting under r. 12, issued the following notice: "The committee have this day, under clause 12 of the General Regulations relating to the constitution of this Association, declared that [the debtors] have defaulted, and that their existing contracts shall be closed out at the following prices [which were then set out]. Rubber provisionally and finally declared on c.i.f. contracts or tendered on landed terms must go through in the ordinary way, being paid for by the defaulters' buyer at striking prices." In that notice the prices were set out, with the result that a balance of 830*l.* 2*s.* 4*d.* was found to be due to the petitioning creditors by the debtors.

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On June 3, 1926, a petition in bankruptcy was filed by the petitioning creditors founded on the act of bankruptcy of April 17. On June 25 the debtors gave notice of their intention to oppose the petition, but a receiving order was made against them by the registrar on June 30, and on July 6 they gave notice of appeal from that order to this Court.

Two facts ought also to be mentioned. There was a contest between the debtors and their bank as to whether the bank were right in refusing to honour the four cheques referred to, the debtors alleging that they had made a binding agreement with the manager of the bank under which he undertook to honour these cheques. The bank had suspended the bank manager on the ground that his action in making such an arrangement was not within his authority.

On May 7, 1926, the bank had issued a writ against the debtors claiming 22,487*l.* 7*s.* 10*d.* in respect of an overdraft and for money lent, and on June 10 the debtors had put in a defence and a counterclaim for damages against the bank for their refusal to honour the four cheques, and on July 1 the bank had put in a reply.

The statement of affairs showed a deficiency in the debtors' assets of 35,737*l.* 1*s.* 3*d.*

The appeal was heard on July 23, 1926.

Clayton K.C. and *Oscar Kean* for the appellants. It is submitted that a receiving order ought not to have been made on the following grounds: (1.) that there was no debt due to the petitioning creditors existing at the date of the alleged act of bankruptcy on April 17; (2.) that there was no act of bankruptcy, inasmuch as the notice of suspension relied upon was not a notice given to a "creditor" within the meaning of s. 1, sub-s. 1 (*h*), of the Act of 1914; and (3.) that there was "sufficient cause" within the meaning of s. 5, sub-s. 3, for not making a receiving order, inasmuch as the debtors' failure was brought about by the breach of contract by the bank to honour the debtors' cheques which was the subject of a pending action.

By what may be called the common law of bankruptcy, in order to support a bankruptcy petition there must be a debt existing at the date of the act of bankruptcy. This common law provision is quite distinct from the statutory provision. There must be a liquidated debt existing at the date of the act of bankruptcy: *In re Whelan* (1); *Ex parte Muirhead.* (2) Wace on Bankruptcy, p. 55. Here there was no liquidated debt until April 20, which was after the date of the notice of suspension which constituted the act of bankruptcy.

[They were stopped.]

E. W. Hansell for the respondents. The necessity for a liquidated debt does not arise until the creditor comes to present his petition: Bankruptcy Act, 1914, s. 4. Here at the date of the presentation of the petition the petitioning creditors' debt had ripened into a liquidated sum, and therefore constituted a good petitioning creditor's debt. Sect. 30 shows what debts are provable, and s. 4 what debts can be made the basis of a petition. The Court must distinguish between a provable debt and a good petitioning creditor's debt. The debt upon which the petition is founded must have existed at the time of the act of bankruptcy relied on: *Moss* v. *Smith* (3): *Ex parte Hayward.* (4) The debt there referred to, it is submitted, means a provable debt. Here the petitioning creditor's debt which was liquidated after April 17 was a debt which existed before the act of bankruptcy. There is no case which decides that the debt must be liquidated at the time of the act of bankruptcy. In *Ex parte Hayward* (4) the debt was liquidated between the date of the act of bankruptcy and the presentation of the petition. *Ex parte Thomas* (5) shows that the question of the debt being liquidated does not arise until the presentation of the petition. Compare the language of the proving section (s. 30) with that of the petitioning section (s. 4).

[SCRUTTON L.J. That only shows that not every creditor who can prove can present a petition.]

(1) 48 L. J. (Bank.) 43, 44.
(2) 2 Ch. D. 22, 28.
(3) 1 Camp. 489.
(4) L. R. 6 Ch. 546.
(5) (1747) 1 Atk. 73.

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Whether a debt is liquidated or not is perfectly immaterial for the purposes of proof. The question only becomes material when the petition is presented. All that is necessary, it is submitted, is that at the date of the act of bankruptcy there should be a debt which is a good provable debt at the date of the petition.

[SCRUTTON L.J. referred to *Ex parte Charles.* (1)]

There is no case in which the present point has been raised.

[He also referred to *In re Raatz.* (2)]

Then as to there being sufficient cause for not making a receiving order.

[He was stopped on this point.]

Clayton K.C. in reply. There was here no debt either liquidated or unliquidated at the date of the act of bankruptcy. Debts provable in bankruptcy constitute an artificial class of debts. The rule in *Moss* v. *Smith* (3) and the cases which followed it dealt with common law bankruptcy apart from statute. There there was a debt payable at a future date, and that was held to be sufficient to support the petition.

[He also referred to *Ex parte Roberts* (4) and *Ex parte Holding.* (5)]

Cur. adv. vult.

July 26. LORD HANWORTH M.R. This is an appeal against a receiving order made by the registrar on June 30, 1926. [His Lordship stated the facts as above set out and continued :] Before the registrar and before this Court the objection was taken that the petition was not well founded. It was contended that although there was an act of bankruptcy on April 17 there was no debt at that date of a liquidated sum ; that it was not until April 20 that the amount of the debt was ascertained, that under r. 12 of the regulations of the Association the sum due was only in respect of differences ; and therefore that on April 17 there was no sum payable by the debtors to petitioning creditors. This raises an

(1) 14 East, 197.
(2) [1897] 2 Q. B. 80.
(3) 1 Camp. 489.
(4) (1815) 1 Mad. 72.
(5) (1821) 1 Glyn & J. 97.

important point under the statute law and under the common law of bankruptcy.

In s. 30, sub-s. 3, of the Bankruptcy Act, 1914, a wide range of debts which can be proved for is catalogued, but it is not every debt that is provable in bankruptcy. Sub-sect. 2 provides: "A person having notice of any act of bankruptcy available against the debtor shall not prove under the order for any debt or liability contracted by the debtor subsequently to the date of his so having notice." That sub-section repeats the provision in the old statute of 46 Geo. 3, c. 135, to which reference is made in *Moss* v. *Smith* (1), but the provision does not touch the point that the debt must be due at the time of the presentation of the petition.

In order to see the conditions on which a creditor may present a petition one must look at s. 4. Sub-sect. 1 of that section provides (inter alia) that "A creditor shall not be entitled to present a bankruptcy petition against a debtor unless—(*a*) the debt owing to the petitioning creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to the several petitioning creditors, amounts to fifty pounds, and (*b*) the debt is a liquidated sum, payable either immediately or at some certain future time."

It is said by the appellants that clause (*b*) means that the debt must be a liquidated sum at the time the act of bankruptcy is committed. On the other hand the respondents contend that provided the debt is liquidated at the time the petition is presented that is sufficient, and, therefore, that as in the present case the sum was liquidated when the petition was presented, the petitioning creditors complied with the requirement of s. 4.

It appears that in addition to the statute law there is also the common law of bankruptcy, which was recognized in 1808 when *Moss* v. *Smith* (1) was decided before Lord Ellenborough, in which the same point was insisted upon. In that case it was argued by counsel for the petitioning creditor "that by 46 Geo. 3, c. 135, the commission was not avoided or defeated by reason of the act of bankruptcy having been

(1) 1 Camp. 489.

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committed prior to the petitioning creditor's debt becoming due, the intention of the statute being, to render it immaterial in what order the act of bankruptcy and the petitioning creditor's debt arose, so that both were perfect at the date of the commission." The point relied upon by the respondents in this case could not be more accurately stated, but upon that point the Court were unanimous in refusing to accede to the contention. Lord Ellenborough said (1): "The grievance which the statute meant to remedy, was the practice of upsetting commissions of bankrupt by unexpectedly proving an act of bankruptcy prior to that relied upon on the part of the assignees, as had happened so repeatedly in Steel's bankruptcy, and in other instances. Such was certainly the intention of those who supported the bill when it passed through Parliament, and this was the natural construction of the clause in question. Could it be contended, then, that by a sort of side wind, a new class of petitioning creditor's debts was established, and the bankrupt law so materially altered?" It is plain that this very point was argued and directly decided against the respondents in this case.

In *Ex parte Charles* (2) the same point was raised. It was there argued "that this is a debt by relation from the judgment to the verdict; but however that relation might suffice to make a debt proveable under the commission, it is not sufficient to make a petitioning creditor's debt, which must be a perfect legal debt at the time of the act of bankruptcy." In reply (3) it was contended that there was nothing in the statute 5 Geo. 2 which required the petitioning creditor to have a demandable debt at the time of the act of bankruptcy. Lord Ellenborough, however, held that the debt in that case was not a sufficient debt in law to support the commission.

More recently in *Ex parte Hayward* (4) the same point was considered, and James L.J. said (5): "Was there, then,

(1) 1 Camp. 491.
(2) 14 East, 197, 205.
(3) 14 East, 209.
(4) L. R. 6 Ch. 546.
(5) L. R. 6 Ch. 548.

a petitioning creditor's debt at the time of the act of bankruptcy? I am of opinion that there was not. The date of the bill proves nothing. It is necessary to prove the issue of the instrument before the act of bankruptcy. The instrument itself, as Lord Tenterden says in *Cowie* v. *Harris* (1), does not shew the period of the indorsement or acceptance. Here that which ultimately ripened into an acceptance was written before the execution of the deed, but it was not an acceptance till the bill was put into the hands of the petitioning creditors; so there was no debt upon it at the date of the deed. Now, it is an old-established rule that the debt of the petitioning creditor must be a debt which existed at the time of the act of bankruptcy, subject to the special provision about debts in futuro." Mellish L.J. gave the reason for the rule. He said (2): "It has always been the settled rule that the debt of the petitioning creditor must be a debt which existed at the time of the act of bankruptcy. The law was so settled, not on the ground of any express words in any of the Bankruptcy Acts, but because it would be manifestly unjust that a person who commits an act of bankruptcy, and who happens to have no creditors, or pays all his creditors in full, should be liable to be made bankrupt on account of that act by some person to whom he afterwards becomes indebted."

In *Ex parte Muirhead* (3) Cockburn C.J. said: "Now in order to constitute a good petitioning creditor's debt, you must have that which may be the immediate subject of an action at law or suit in equity."

In *In re Whelan* (4) Bacon C.J. said: "I thought that there was no doubt about the law, that in no case can a man be made a bankrupt unless he owes 50*l.* at the date of the act of bankruptcy."

The decisions in those cases show that there must be at the date of the act of bankruptcy an available debt payable and due from the debtor, and therefore, under s. 4 of the Bankruptcy Act, 1914, the creditor is not entitled to present a bankruptcy

(1) (1827) 1 Moo. & M. 141.
(2) L. R. 6 Ch. 546, 549.
(3) 2 Ch. D. 22, 25.
(4) 48 L. J. (Bank.) 43, 44.

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petition against the debtor unless the debt is a liquidated sum.

Those authorities have been considered in a note in Williams' Bankruptcy Practice, 13th ed., p. 42, which has the authority of Vaughan Williams L.J. That note states: "By what may be called the Common Law of Bankruptcy, it has always been held that the petitioning creditor's debt must have accrued due before the act of bankruptcy on which it is intended to found the petition: *Moss* v. *Smith* (1); but the debt need not have been due to the petitioning creditor at the date of the act of bankruptcy." It is impossible to neglect the stream of authorities on this point, and therefore, as there was no sum fixed as due to the petitioning creditors on April 17, s. 4 of the Act has not been complied with, and accordingly no receiving order ought to have been made. The appeal must be allowed with costs.

WARRINGTON L.J. I am of the same opinion. It is unnecessary to re-state the facts which have already been stated by the Master of the Rolls. It is sufficient to say that the alleged act of bankruptcy was committed on April 17, and that the sum alleged to be owing was not ascertained until April 20. In those circumstances two questions have been raised: (1.) whether there was a sufficient act of bankruptcy on April 17; and (2.) whether the debt relied upon by the petitioning creditors was sufficient to support the petition. It has also been said that there was sufficient cause for the exercise by the registrar of his power conferred upon him by s. 5, sub-s. 3, of the Act of 1914 to dismiss the petition, and that he ought to have done so and ought not to have made a receiving order in the circumstances of the case; but in my opinion that contention wholly fails on the facts.

As to the first question, whether there was a sufficient act of bankruptcy on April 17. The act of bankruptcy alleged was that the debtors gave notice to some of their creditors that they were about to suspend payment of their debts, and it was alleged that the persons to whom that

(1) 1 Camp. 489.

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notice was given were not creditors at that time. But that point fails, because, in my opinion, the word "creditors" in s. 1, sub-s. 1 (*h*), of the Act of 1914, means creditors for the purposes of the Act. The petitioning creditors' debt is undoubtedly a debt provable in bankruptcy, and therefore it cannot be said that the petitioning creditors were not creditors. In my judgment the notice of suspension was given to creditors within the meaning of s. 1, sub-s. 1 (*h*), of the Act, therefore it constituted an act of bankruptcy by the debtors.

Then comes the question whether there existed a good petitioning creditors' debt which was a debt sufficient to support a petition. Such a debt must fulfil certain conditions which are expressed in s. 4, sub-s. 1 (*a*) (*b*). [His Lordship read clauses (*a*) and (*b*) of the sub-section and continued:] Now at the date of the petition there was a liquidated sum payable immediately or at some certain future time by the debtors to the petitioning creditors, and prima facie therefore there existed a good petitioning creditor's debt. But by the common law rule in bankruptcy, beyond fulfilling the conditions required by the statute, the debt relied upon must also fulfil all the conditions required to make it a good petitioning creditor's debt. In the well known text-book, Williams' Bankruptcy Practice, 13th ed., p. 42, there is a statement by Vaughan Williams L.J. [His Lordship read the passage set out in the judgment of the Master of the Rolls and continued:] That is the opening sentence of a note in which the learned author discusses a series of cases beginning with *Moss* v. *Smith*. (1) In my opinion that passage correctly expresses what is really the law, that is to say, the debt must, at the date of the act of bankruptcy, be such a debt as could be relied upon by the petitioning creditor to support his bankruptcy petition.

Mr. Hansell, for the petitioning creditors, has contended that the condition that the debt should be a liquidated sum at the date of the act of bankruptcy did not form part of the common law rule of bankruptcy, but, in my opinion, there is no ground for that contention. It seems to me that there

(1) 1 Camp. 489.

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must be a debt of a liquidated sum at the date of the act of bankruptcy, and that that is the only logical conclusion.

For these reasons the receiving order was, in my opinion, improperly made, and ought to be discharged and this appeal allowed.

SCRUTTON L.J. I agree.

Appeal allowed.

Solicitors for appellants: *Cohen & Cohen.*

Solicitors for respondents: *Coward, Chance & Co.*

W. I. C.

C. A. 1925 ROMER J. *Dec.* 9, 10, 11; 16, 17. 1926 *Feb.* 4. C. A. *May* 11, 12.

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[1925. A. 1.]

Local Government—Emergency Legislation—Employees of local Authority—Enlistment or calling up—Contract to pay "full civil pay" whilst serving with Forces—Subsequent Increases—Whether included—Ultra vires—Local Government (Emergency Provisions) Act, 1916 (6 & 7 *Geo.* 5, *c.* 12), *s.* 1—*Action to recover Increases of Pay—How far barred by Statute of Limitations—Civil Procedure Act*, 1833 (3 & 4 *Will.* 4, *c.* 42), *s.* 3—*Limitation Act*, 1623 (21 *Jac.* 1, *c.* 16).

On September 15, 1914, the Council of the defendant corporation passed a resolution that the whole of their Council employees married or single called up for service or volunteering for service with the forces should be granted "full civil pay," less their service pay (calculated at 7*s.* per week), and in the case of married men in the army, less also the amount of the separation allowance for the wife, as from the date of mobilisation or enlistment, the Council's payments to be continued so long as the employees were required to remain in the forces and were in receipt of naval or military pay: and that increments of salary under any scale becoming due to any officer or employee during his period of service with the forces of the Crown should be paid as they accrued. The plaintiff, who was employed by the Council as a rivetter and driller, in reliance on that resolution volunteered for service with the forces and enlisted on November 11, 1914. He was at that time a married man and was in receipt of a weekly wage of 1*l.* 11*s.* 3*d.* The defendants had in fact no power to make the payments authorized by the resolution, but on May 17, 1916, the Local Government (Emergency Provisions) Act, 1916, came into force, by s. 1, sub-s. 1, of which it was provided that "any local authority may grant leave of absence

to any officer or servant for as long a period as may be necessary to enable him to serve in or with His Majesty's forces for the purposes of the present war, and the local authority may—(*a*) whilst he is so serving pay to him or to his wife or other dependants nominated by him a sum which shall not, without the sanction of the Local Government Board, exceed his civil remuneration after deducting therefrom the amount of his naval or military pay and allowances . . . . ," and by sub-s. 2: "This section shall apply to the case of an officer or servant of a local authority who before the passing of this Act took service in or with His Majesty's forces with the sanction or permission of the local authority, and any resolution, promise, sanction or permission, passed or given by a local authority to any such officer or servant with a view to his serving in or with His Majesty's forces, shall be binding on the local authority to the extent and only to the extent to which it could have been passed or given if the provisions of this Act had been in force."

As from the date of the plaintiff's enlistment and down to the time of his demobilisation the defendants paid to the plaintiff weekly sums which from time to time varied in amount, and which were calculated upon the assumption that, according to the contract between the parties, the "full civil pay" of the plaintiff was the pay he was receiving at the date of his enlistment.

In an action brought by the plaintiff to recover the increments of pay to which he would have been entitled if he had remained in the service of the defendants:—

Held, by Romer J., that the words "full civil pay" as used in the resolution must be construed according to their natural meaning, and that under them the plaintiff was during the period of his military service entitled to receive the increments of pay which he would have received if he had remained at home and in the employment of the defendants, subject to the deductions referred to in the resolution.

Sutton v. *Attorney-General* (1923) 39 Times L. R. 294 applied.

But *held* by Romer J. and the Court of Appeal that the action was founded upon a simple contract debt and not upon a specialty debt arising out of the Local Government (Emergency Provisions) Act, 1916, and therefore that the Limitation Act, 1623, and not the Civil Procedure Act, 1833, applied.

Held, therefore, that the plaintiff could only recover such increments of pay as became payable within the six years preceding the issue of the writ in the action.

Cork and Bandon Ry. Co. v. *Goode* (1853) 13 C. B. 826 distinguished.

ACTION.

The action was brought by the plaintiff for (1.) a declaration that according to the true construction of a resolution of the Council of the defendants dated September 15, 1914, he was entitled to all war bonuses and/or increments of salary which he would have received during the period of his military

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services if he had not enlisted and had continued in his employment; (2.) payment of 95*l.* 15*s.* 6*d.*; and (3.) damages.

The following statement of facts is taken from the written judgment of Romer J. :—

On September 15, 1914, the Council of the defendants duly passed a resolution in the terms following: "That the whole of the Council's employees (including the teaching staff) married or single called up for service or volunteering for service with the forces be granted by the Council full civil pay less their service pay (calculated at 7*s.* per week) and in the case of married men in the army less also the actual amount of the separation allowance for the wife, as from the date of mobilisation or enlistment, the Council's payments to be continued so long as the employees are required to remain with the forces and are in receipt of naval or military pay: and that increments of salary under any scale becoming due to any officer or employee during his period of service with the forces of the Crown be paid as they accrue." In order that the terms of this resolution should be brought to the attention of the Council's employees they were published in a paper known as The Stratford Express, and were in this way brought to the attention of the plaintiff, who was employed by the Council as a rivetter and driller. Thereupon, in reliance upon the resolution, the plaintiff volunteered for service with the forces of the Crown and enlisted on November 11, 1914. He was at the time a married man and was in receipt of a weekly wage of 1*l.* 11*s.* 3*d.*

The resolution of the Council thus advertised constituted an offer to the plaintiff to pay to him in the event of his volunteering for service with the forces, and as from the date of his enlistment "full civil pay" less his service pay calculated at 7*s.* per week, and less also the separation allowance for his wife. The plaintiff accepted that offer by enlisting. If, therefore, the defendants had power to make such payments, the defendants thereupon became bound by contract with the plaintiff to make them. At the time of the plaintiff's enlistment the defendants in point of fact had no such power. But on May 17, 1916, the Local

Government (Emergency Provisions) Act, 1916, came into force. Sect. 1 of that Act is, so far as material, as follows: "(1.) Any local authority may grant leave of absence to any officer or servant for as long a period as may be necessary to enable him to serve in or with His Majesty's forces for the purposes of the present war, and the local authority may—(*a*) whilst he is so serving pay to him or to his wife or other dependants nominated by him a sum which shall not, without the sanction of the Local Government Board, exceed his civil remuneration after deducting therefrom the amount of his naval or military pay and allowances. . . . . (2.) This section shall apply to the case of an officer or servant of a local authority who before the passing of this Act took service in or with His Majesty's forces with the sanction or permission of the local authority, and any resolution, promise, sanction or permission, passed or given by a local authority to any such officer or servant with a view to his serving in or with His Majesty's forces, shall be binding on the local authority to the extent and only to the extent to which it could have been passed or given if the provisions of this Act had been in force: Provided that where before the passing of this Act a local authority has resolved, promised, sanctioned or agreed to make payments in excess of the amounts authorised by this section, any such excess payments up to the date of the passing of this Act, or such later date as may be determined by the Local Government Board, shall be deemed to have been lawfully made, and the Local Government Board shall sanction the continuance of such excess payments after such date as aforesaid in any case where it appears to them that the man joined His Majesty's forces in reliance on such resolution, promise, sanction or agreement, and that the amount of the excess is not unreasonable." If this Act had been in force at the date of the plaintiff's enlistment the defendants would have had power to make the payments referred to in the resolution so far, but only so far, as such payments were not in excess of those permitted by the Act. Accordingly, by virtue of s. 1, sub-s. 2, the defendants to this extent, though only to this extent, became

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bound to the plaintiff by contract to make such payments. For it cannot in my opinion be doubted that the plaintiff took service in His Majesty's forces with the sanction or permission of the defendants, and that the resolution was passed with a view to his so serving.

As from the date of the plaintiff's enlistment and down to the date of his demobilisation the defendants paid to the plaintiff weekly sums that from time to time varied in amount. These sums would appear after a time to have been in excess of the difference between the 1*l.* 11*s.* 3*d.* (the weekly pay of the plaintiff at the time he enlisted) and the 7*s.* per week and the plaintiff's separation allowance. But the amount so paid was calculated upon the assumption that, according to the contract between the parties, the "full civil pay" of the plaintiff was the pay he was receiving at the date of his enlistment, and not the pay that he would have received had he stayed in the defendants' employment. The plaintiff would in that event have received from time to time increases of pay by virtue of certain resolutions of the Council. These increases are referred to in para. 5 of the statement of claim, and for the present purposes may be taken to be stated accurately.

The action was tried before Romer J. on December 9, 10, 11, 16 and 17, 1925.

Sir Thomas Hughes K.C., *E. F. Ball* and *W. Frampton* for the plaintiff.

Maugham K.C. and *Dighton Pollock* for the defendants.

Cur. adv. vult.

1926. Feb. 4. ROMER J. read the following judgment in which, after stating the facts as above set out, he continued: The plaintiff contends that according to the true construction of the resolution he was entitled to receive from the defendants in each week a sum equivalent to the pay that he would have received had he still been in their service, after deducting therefrom 7*s.* and his separation allowance. The defendants, on the other hand, contend that the words

"full civil pay" in the resolution mean the pay that the plaintiff was receiving at the date of his enlistment. The defendants further contend that, even if the plaintiff be right in his view of the meaning of the resolution, the Statute of Limitations is a complete answer to his claim in respect of all sums that became payable to him more than six years before January 1, 1925, the date of the issue of the writ in this action. They further allege that the plaintiff has in fact been paid as large a sum as the defendants had power to pay him under the Act of 1916, and that this is especially the case in respect of the period from January 1, 1919, to March 10, 1919, when the plaintiff was demobilised. As regards this last allegation of the defendants, I am not in possession of sufficient materials to enable me to come to any conclusion upon it. All I can do is to decide the question of construction and the question arising under the Statute of Limitations. When these questions have been decided, the amount (if any) due from the defendants to the plaintiff will have to be ascertained by inquiry.

First, then, as to the question of the meaning of the words "full civil pay" contained in the resolution of September 15, 1914. These very words were considered and construed by the House of Lords in *Sutton* v. *Attorney-General* (1), a case relating to a contract of the same class as that to which the contract in the present case belongs. The plaintiff in that case, who was a telegraphist in the service of the Postmaster-General, enlisted as an office telegraphist in the Royal Engineers' Special Reserve Signal Section, in response to and in reliance upon a circular published by the Postmaster-General. The material part of the circular was in these words: "Post Office servants enlisting as office telegraphists . . . . in the Royal Engineers' Special Reserve Signal Section are allowed full civil pay in addition to military pay when called up for service." After the plaintiff had enlisted, and while he was still serving with His Majesty's forces, temporary increases of pay by way of war bonus were from time to time granted to persons remaining at home in the service

(1) 39 Times L. R. 294; [1923] W. N. 124.

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of the Post Office, who had been receiving the same rate of pay as the plaintiff. It was held that the plaintiff was, under the terms of the circular, entitled to receive these war bonuses and not merely the pay that he was entitled to at the date of his enlistment. The defendants seek to distinguish that case in that the circular there differs from the resolution in the present case in two particulars. According to the circular full civil pay was to be paid in addition to military pay. According to the resolution the plaintiff was entitled to receive full civil pay less a fixed sum in respect of his service pay and less his separation allowance. Now Lord Birkenhead, in the course of his speech, after referring to the fact that the claimant in the case before the House of Lords was entitled to his full civil pay in addition to his military pay, said (1): "No one doubts that his military pay means such as would be payable to him during his period of service. No one doubts that whatever that pay might be (it did, in fact, increase) the full civil pay was still to remain payable; but if the civil pay is to be taken as at the date of enlistment, what reason is there on the words of the contract to apply another and different meaning to the term 'military pay'? And, if one does not apply a different meaning, then on the respondents' contention all that the man is to receive is the amount obtained by adding together his civil pay and his military pay at the date of enlistment; so that by whatever amount his military pay might increase by reason of his valour or efficiency, by that amount his 'full civil pay' would undergo a reduction. Such a contention was not and could not be raised, but it is a relevant consideration." These observations of Lord Birkenhead are no doubt inapplicable to the present case, inasmuch as under the resolution the military pay is to be deducted from the full civil pay and is to be taken at a fixed sum of 7*s*. per week. But Lord Birkenhead's judgment was not entirely, nor even principally, based upon the considerations with which he was dealing in the passage that I have cited. He merely referred to them as indications which

(1) 39 Times L. R. 296;

seemed to point in the direction of the conclusion to which, as I read his judgment, he would have come apart altogether from such considerations. "In my opinion," he said (1), "the postal employee was by the circular offered this inducement—viz., that he was to be, and remain during his period of service, better off by the amount of his military pay (whatever that might be) than he would have been had he remained in his former calling. This construction does not call for an examination of grades or classes. The man himself alone is to be considered. The result would be that, secure in his prospects if he survived, he could count upon remuneration in excess of what his stay-at-home colleagues enjoyed. That is simple, sure, and solid." If in this passage there be substituted for the inducement mentioned by Lord Birkenhead the inducement that the man was to be at least as well off as his stay-at-home colleagues, the passage would be applicable to the present case. But, however that may be, Lord Finlay was of the opinion that the meaning which Lord Birkenhead attached to the words "full civil pay" in the circular was the natural meaning of those words, and that if it had been intended to fix the civil pay which the appellant was to get at the rate at which it stood when he was called up it would have been so expressed. He added (2): "The natural meaning of 'pay' in this connection is the pay for the time being, and additional words would be necessary to give it any other meaning." Lord Atkinson took the same view. "There is nothing," he said (3), "to show that these words 'full civil pay' were used in any sense other than their natural and ordinary sense, and I think they must be taken to mean full civil pay with all its ordinary inherent privileges and advantages, which would include increments granted according to the practice followed in reference to those receiving full civil pay."

I cannot think that the present case can be distinguished from *Sutton's* case (4) upon the first ground relied upon by the defendants. The other difference between the circular

(1) 39 Times L. R. 296.
(2) Ibid. 298.
(3) 39 Times L. R. 298.
(4) Ibid. 294.

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and the resolution upon which the defendants rely is that the resolution contains the express provision that increments of salary under any scale becoming due to the employee during his period of service—in other words "automatic" increases of salary—should be paid as they accrue. The defendants contend that, in accordance with the principle of expressio unius exclusio alterius, this express provision is sufficient to show that temporary increases of salary by way of war bonus are not included in the words "full civil pay." I feel the force of this contention. But it is to be observed that in *Sutton's* case (1) it was conceded by every one that the words "full civil pay" included automatic increases of salary. The express provision in the resolution was therefore quite unnecessary, and does not in any way enlarge the meaning of the words "full civil pay." But is it sufficient to show that those words were used in less than what Lord Finlay and Lord Atkinson say is their natural meaning? In my opinion it is not. Looking at the matter with the eyes of 1914, to use Lord Birkenhead's expression, it is unlikely that the possibility of an increase of salary by the grant of war bonuses was contemplated either by the defendants or by their employees. I cannot think therefore that the provision in question was inserted for the purpose of excluding from the full civil pay any such bonuses. It seems to me far more probable that the provision was inserted for the purpose of making it clear to the employees that the words "full civil pay" meant the full civil pay to which they would have become entitled had they stayed at home, and that automatic increases of salary were alone referred to, because those were the only increases that at the time were in the contemplation of the parties.

In these circumstances I do not feel justified in refusing to give to the words "full civil pay," as used in the resolution, that which the House of Lords has laid down is their natural meaning. I hold therefore that the increases in salary to which the plaintiff would have become entitled had he

(1) 39 Times L. R. 294.

remained at home and continued in the employment of the defendants as a rivetter and driller are included in the full civil pay that, subject to the deductions referred to in the resolution, the defendants contracted to pay him during the period of his military service.

The next question to be considered is that of the Statute of Limitations. The defendants contend that the action is one founded upon simple contract, and that the statute applicable to the case is accordingly that of 21 Jac. 1, c. 16. The plaintiff contends that the action is brought upon a statute—namely, the Local Government (Emergency Provisions) Act, 1916, and that the Statute of Limitations applicable to the case is that of 3 & 4 Will. 4, c. 42. Had the Act of 1916 been in force at the time that the plaintiff enlisted in reliance upon the resolution of the defendants' Council, the action would without doubt have been one founded upon simple contract, even though the power of the defendants to make the contract would have been derived from the Act. But it is said that inasmuch as the defendants had no power to make the payments promised by the resolution at the date that the plaintiff enlisted, the obligation on their part that it is sought to enforce in this action was imposed upon them by s. 1, sub-s. 2, of the Act of 1916 alone, and that the action is accordingly founded upon a statute which is a specialty. This is a question of some difficulty upon which there does not appear to be any direct authority, though there are one or two authorities that have a bearing upon the matter. In *Cork and Bandon Ry. Co.* v. *Goode* (1), an action to recover calls on shares was brought by the railway company which was subject to the provisions of the Companies Clauses Act, 1845. The declaration stated that the defendant was the holder of thirty shares in the plaintiff company and was indebted to the company in a certain sum in respect of certain calls, whereby an action had accrued to the said company by virtue of the Companies Clauses Act, 1845, and the company's private Act. The defendant pleaded that the action was founded upon contracts without specialty

(1) 13 C. B. 826.

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and that the cause of action did not accrue within six years before the suit. It was held that the plea was bad, as the action was founded upon the statute and therefore upon a specialty. But in that case there was no contract by the shareholder to pay the calls apart from the statute. In the course of the argument on behalf of the defendant, Maule J. put this question (1): "Where is the shareholder's undertaking to pay calls but for the statute?" and it was conceded that there was none. Thereupon the same learned judge said: "Then he undertakes by the statute," and later on added this (2): "There may be statutes which may be in part or in whole the foundation of an action of assumpsit. This is *debt*, founded upon the statute, and upon nothing else." Jervis C.J., in giving judgment, after pointing out that the action was an action of debt, and professed to be an action upon the two statutes, said (2): "I think it *is* an action upon statute. . . . . But for the Act of Parliament, no action could be brought by the company against one of its own members. This, therefore, is an action brought in respect of a liability created by statute, and therefore is an action founded upon the statute." Maule J., after stating that it was manifest upon reading the declaration that it was a declaration in debt upon the two statutes, said (3): "Now, a declaration in debt upon a statute, is a declaration upon a specialty; and it is not the less so because the facts which bring the defendant within the liability, are facts dehors the statute: that must constantly arise in actions for liabilities arising out of statutes. That appearing to be so, the allegation in the plea, that the action is upon contracts without specialty, is a false allegation of a matter of law. There may, undoubtedly, be cases where a statute enables an action to be brought, which nevertheless is not an action on the Act of Parliament. But the question is, whether that state of things exists here. I think it manifestly appears that this is an action of debt, and upon the statute, and therefore an action upon a specialty."

(1) 13 C. B. 831. (2) 13 C. B. 834.
(3) 13 C. B. 835.

In re Cornwall Minerals Ry. Co. (1) was also cited to me on behalf of the plaintiff. The question arising there was as to whether the liability of a railway company to pay interest on debenture stock issued under the Companies Clauses Act, 1863, was a statutory liability. It was held by Vaughan Williams J. that it was. There again, however, there was no contract by the company to pay the interest. Its liability to do so was to be found in the statute and in the statute alone. But the fact that a liability to make a payment is imposed by statute does not necessarily lead to the conclusion that an action brought to enforce such liability is an action upon a specialty.

In *Salford Corporation* v. *Lancashire County Council* (2) an action was brought to recover the amount contributed by the plaintiffs to the expenses incurred by the local authority of the county in carrying out the provisions of the Contagious Diseases (Animals) Act, 1869. By s. 97 of that Act it was provided as follows: "Notwithstanding anything in this Act, the local authority of each borough situate within a county and assessed to the county rate thereof shall be recouped the proportionate amount contributed by the borough to the expenses incurred by the local authority of the county in pursuance of this Act (including expenditure in compensation for animals slaughtered, or in respect of principal of or of interest on money borrowed in pursuance of this Act), so that the burden of those expenses shall be borne wholly by the county, and not as to any part thereof by any borough situate within the county." After the passing of the Act the plaintiffs contributed their yearly quota to the county rate, but they were not recouped the proportionate part mentioned in s. 97 by the justices who were at that time the local authority of the county. The plaintiffs' action failed on the ground that the only remedy against the justices would have been by mandamus to pay the amounts claimed out of moneys in their hands or to levy a rate for the purpose; and that the defendants as the successors of the justices were in the same position. But in

(1) [1897] 2 Ch. 74. (2) (1890) 25 Q. B. D. 384.

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giving judgment Lord Esher said (1): "There is another fatal objection to the claim of the plaintiffs. Supposing that an action could be brought against the County Council to make them liable for the whole of the claim of the plaintiffs, it seems to me that the liability would be to pay out of a particular fund, and that is enforced by action on the case, and not by action for debt on the statute. To such an action the six years' limitation of the Statute of Limitations would apply, and the claim of the plaintiffs would be barred."

The last case to which I must refer is that of *Thomson* v. *Lord Clanmorris.* (2) That was an action brought against certain directors to recover compensation under the Directors Liability Act, 1890. It was contended by the directors that the action was one for "penalties, damages or sums of money given to the party grieved by any statute" within the meaning of s. 3 of the Civil Procedure Act, 1833, and that, inasmuch as the action had not been commenced within two years after the plaintiff's cause of action arose, his claim was barred by that section. It was held that this contention of the defendants was unsound, and, as the action had been commenced within six years of the time when the cause of action arose, it did not become necessary to determine whether such an action was governed by the Civil Procedure Act or the statute of 21 Jac. 1, c. 16. But in giving judgment Vaughan Williams L.J. expressly dealt with that point. He said (3): "One must consider what is really the nature of the enactment contained in s. 3 of the Directors Liability Act, 1890. And it seems to me that, though that section does not in form give a new action, though it only says that directors and others 'shall be liable to pay compensation to all persons who shall subscribe for any shares on the faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement in the prospectus,' yet what the section really does is to give a new action on the case. It creates a new negative duty. The directors or promoters, or whatever other class is included in this section,

(1) 25 Q. B. D. 388. (2) [1900] 1 Ch. 718.
(3) [1900] 1 Ch. 727.

have cast upon them a new duty in respect of prospectuses and similar documents. Speaking generally, one may say that the Act creates a new statutory duty of accuracy—a new statutory duty to abstain from inaccurate and untrue statements, and then in effect gives a new action on the case to those persons who may have been injured by the neglect of that statutory duty. It seems to me, therefore, that this case is provided for by the statute of 21 Jac. 1, c. 16. The action is an action on the case, and if so of course the six years' limitation would apply. But it is said that this is not an action on the case, but an action on the statute, and *Cork and Bandon Ry. Co.* v. *Goode* (1) is relied on. But it must be remembered that there the action was for a statutory debt, and the sole question was whether that debt was, within the terms of s. 3 of the statute of James, 'grounded on a contract without specialty.' It does not seem to me that that decision is really material to the case now before us. Maule J. pointed out that there is a difference between an action which is given by a statute and an action on the statute. *Cork and Bandon Ry. Co.* v. *Goode* (1) was an action of debt on the statute. And, as I have already said, the only question there really was whether the action came within the words of s. 3 of the statute of James. In the present case it seems to me that a new duty of accuracy in respect of the preparation and issue of prospectuses is created, and an action on the case is given to those persons who are injured by the breach of that duty. It is said that this is a new form of statute. But I do not think that in substance this statute differs from the Statute of Marlbridge (52 Hen. 3, c. 1 and c. 4), by which, in respect of not only illegal but irregular and excessive distresses, it is provided that, notwithstanding the liability to punishment, 'nevertheless sufficient and full amends shall be made to them that have sustained loss by such distresses.' So here it seems to me that the effect of s. 3 of the Act of 1890 is that amends shall be made to those who have sustained loss by being induced to subscribe for shares by reason of misstatements in the prospectus."

(1) 13 C. B. 826.

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By the statute a liability was imposed upon the directors to pay compensation. Apart from the statute they were not liable. But the Lord Justice treated the action, not as one brought on the statute, but as an action given by the statute, although in terms the statute did not purport to give any right of action.

These being the authorities bearing on the case the question that I have to determine is whether or not the action is one brought upon the Act of 1916. In my opinion it is not. I must, to use the words of Vaughan Williams L.J., consider what is really the nature of that enactment. Now if, at the time that the plaintiff enlisted, the Act of 1916 had been in force, his action would have been brought upon the simple contract subsisting by reason of the offer contained in the defendants' resolution, and the acceptance of that offer by the plaintiff. The Statute of Limitations applicable to such an action would have been that of 21 Jac. 1, c. 16, notwithstanding the fact that the power of the defendants to enter into that contract was derived from the Act of 1916. The Act does not in terms give power to a local authority to enter into any such contract. It merely gives power to make certain payments. But it seems necessarily to follow that the authority may contract to make them. If therefore the Act had provided that local authorities were to be deemed at all material times to have had power to make such payments, the plaintiff's action would be one based upon a simple contract, and the statute of 21 Jac. 1, c. 16, would apply. The Act does not in terms so provide, but for the purposes of the present case it seems to me that I ought to treat it as though it did. Sub-sect. 2 of s. 1 begins by stating that the section shall apply to the case of an officer or servant of a local authority who, before the passing of the Act, took service in or with His Majesty's forces with the sanction or permission of the local authority. Any such payments therefore as are mentioned in sub-s. 1 that were made to the plaintiff after the passing of the Act would not be unlawful payments. Accordingly, so far as regards legality of payment, servants who took service before the passing of the

Act are treated on the same footing as those who did so afterwards. The sub-section then goes on in a way that suggests that there was to be no distinction between the two classes even as regards contracts entered into with them by the local authority. It provides in effect that the contract entered into with a servant of the former class is to be binding on the authority to the extent (though only to the extent) to which it would have been binding if the provisions of the Act had then been in force. It seems to me to follow from this that for the purpose of considering the rights and liabilities of the parties to such a contract I am to treat it as though, at the date it was entered into, the provisions of sub-s. 1 had been in force. Now it is true that the statute of James I. and the Civil Procedure Act only affect the remedies for recovering a debt and not the existence of the debt itself. But a right that can be enforced at any time within twenty years is in one sense a larger right than one that can only be enforced within six years, and a liability that can be enforced within twenty years is in the same way larger than one that can be enforced within six years. If therefore I were to accede to the contention of the plaintiff, the result would be that, to the extent that I have mentioned, the rights and liabilities of the parties under a contract entered into before the Act would be different from those that would have existed had the Act been in force at the date of the contract.

For these reasons I am not prepared to treat the plaintiff's action as brought upon a statute, but as one that is brought upon a simple contract that is binding upon the defendants, because I am to treat it as though, at the time that it was made, the provisions of the Act of 1916 had been in force.

The plaintiff's action accordingly fails so far as he seeks to recover any payments that fell due before January 1, 1919. There must be an inquiry to ascertain whether there is anything due to the plaintiff in respect of payments that ought to have been made since December 31, 1918, and the costs of the action must be reserved to be dealt with when that inquiry has been answered.

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The plaintiff appealed. The appeal was heard on May 11 and 12, 1926.

O'Malley for the appellant. It is common ground that if the decision of Romer J. is right the appellant cannot recover any sums which became due before January 1, 1919. The real question is whether the statute 21 Jac. 1, c. 16, applies. It is submitted that, by reason of the resolution of September 15, 1914, being ultra vires, there was no contract of any kind until the Local Government (Emergency Powers) Act, 1916, was passed.

[WARRINGTON L.J. The agreement of the respondents with the appellant is made lawful by that statute.]

Assume there was an agreement made but no statute passed, the agreement would be a mere nudum pactum. The appellant would have nothing on which he could rely.

[LORD HANWORTH M.R. The statute does not impose any obligation on the local authority to employ or enter into any contract.]

None of the cases which have been cited has any bearing on the present case. It is submitted that apart from the Act of 1916 and before that Act there was no agreement at all. The idea of investing local authorities with retrospective powers of entering into contracts was never, it is submitted, in the contemplation of the Legislature when the Act was passed. It is not the agreement entered into which is validated by the Act, but an agreement as modified by the Act. It was the Act which made the contract between the parties. The appellant's claim is therefore based on statute, and being so based is in respect of a specialty and not a simple contract debt, to which the limitation of twenty years and not six years applies: *Cork and Bandon Ry. Co.* v. *Goode* (1); *In re Cornwall Minerals Ry. Co.* (2)

Salford Corporation v. *Lancashire County Council* (3) turned on the distinction between an action for debt and an action

(1) 13 C. B. 826.
(2) [1897] 2 Ch. 74.
(3) 25 Q. B. D. 384.

on the case. *Thomson* v. *Lord Clanmorris* (1) was an action for penalties, and does not apply to the present case.

Maugham K.C. and *Dighton Pollock* for the respondents were not called upon to argue.

LORD HANWORTH M.R. This is an action brought by Arthur William Aylott against the Mayor, Aldermen and Burgesses of the county borough of West Ham. The statement of claim sets out the fact, as fact it was, that the plaintiff is and was at all material times employed by the defendants as a rivetter and driller.

Aylott joined up in the forces of the Crown soon after the outbreak of the war, in November, 1914. He volunteered, as so many others did. It appears that on September 15, 1914, the Council had adopted a resolution which, putting it quite shortly, was that they were to continue to pay their employees the difference between the sum which they would have received if they had continued in civil employment, and the sum which they would receive when undertaking duty with the forces of the Crown.

By this action, which was commenced on January 1, 1925, Aylott seeks to recover the total of the increments which he says would have enured to him by reason of the increases which were made in civil pay during the time he was serving. He claims to be entitled to recover what may be called the back sums due to him under and by virtue of the resolution which had been passed by the Council on September 15, 1914.

Among other matters which are pleaded, because the question arises as to what were the actual terms of the contract, and as to whether or not the defendants are responsible in respect of those sums, one short but very effective point is taken by the defendants. They plead that the Statute of Limitations (21 Jac. 1, c. 16) applies, and that what is now being claimed did not become due within six years before the commencement of the action, that is to say, before January 1, 1925. Mr. O'Malley agrees that if this action is one to which that statute applies, it would not be possible

(1) [1900] 1 Ch. 718.

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for him to recover any sums which accrued due before January 1, 1919, that is six years before action brought. It becomes, therefore, necessary to see whether this action and this claim for these moneys is one which is within the Statute of Limitations and the six-year rule imposed by it.

Now it appears that at the time this resolution was adopted by the defendants in September, 1914, there was no power to make such payments as the resolution intended they should make. That point, which had been overlooked, came to light at a later stage of the war, and an Act was passed to deal with it, an Act which was called the Local Government (Emergency Provisions) Act, 1916. That Act received the Royal Assent, and thus became an effective Act of Parliament on May 17 of that year. It contains a number of miscellaneous provisions dealing with difficulties which had arisen in various Government departments during the war, but in particular it provides by sub. s. 1 of s. 1 that a local authority may grant leave of absence to any officer or servant for as long a period as may be necessary to enable him to serve in or with His Majesty's forces for the purposes of the present war, and that during his time of service they may pay him sums which after deducting the sums which he received for military service alone, would not be in excess of the sums which he would have received if he had continued in civil employ. Sub-sect. 2 of s. 1 provides: "This section shall apply to the case of an officer or servant of a local authority who before the passing of this Act took service in or with His Majesty's forces with the sanction or permission of the local authority." Arthur William Aylott was one of those persons. Then the sub-section goes on: "and any resolution, promise, sanction or permission, passed or given by a local authority to any such officer or servant with a view to his serving in or with His Majesty's forces, shall be binding on the local authority to the extent and only to the extent to which it could have been passed or given if the provisions of this Act had been in force." The effect of sub-s. 1 is to provide that as and from May 17, 1916, the local authority is empowered to make the payments

which it may be minded to make and which it might adopt by resolution, which it might promise or sanction or permit or agree to pay to those persons who took service subsequent to the time when the local authority has been given power to make such agreements or contracts in accordance with the terms of the Act. I think it is plain that the sub-section does not require the local authority to enter into such agreements or make such promises. It empowers it to do so.

Mr. O'Malley in an argument which was quite clear and presented with a good deal of force, said that from and after the time when this Act came into force, that is May 17, 1916, he would accept the position that a person who at that time was an employee of the local authority and thereafter went to serve with His Majesty's forces, had a contractual right to recover such sums as the local authority were empowered to give under the provisions of the Act of 1916. But he says the position is quite different with regard to claims which are made in respect of promises or agreements made before the Act came into force. With regard to those he says: True, there was a promise and true there was an agreement made, but that agreement and that promise were ineffective and the statute shows it, because it was passed with a view to making those agreements effective; and what the statute has done with regard to what I will call antecedent services, or in this particular case, the service between November, 1914, and May, 1916, is to confer upon Arthur William Aylott the right to recover sums which were in excess of his military pay, but which could not have been given to him, although the local authority purported to do so, and can only be paid to him by virtue of the retrospective effect of the statute. Thus, he says, Aylott's claim is one which is based upon a statute. A claim that is based upon a statute is what is called in law a specialty debt, and not a simple contract debt. To a specialty debt the period of limitation which applies is twenty years and not six.

One has therefore to examine what is the nature of the claim which is put forward by Aylott in respect of these increased sums under the resolution of September 15, 1914, down to

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the passing of the Local Government (Emergency Provisions) Act, 1916. Is Aylott's right one which is dependent upon the statute, so that it becomes a specialty debt, or is it a claim in simple contract to which the six years' limitation imposed by the Statute of Limitations applies? We may accept the view laid down in *Cork and Bandon Ry. Co.* v. *Goode* (1) and the other cases which have been cited, that where a plaintiff relies and has to rely upon the terms of a statute so that his claim is under the statute the nature of the claim is one of specialty and the twenty years applies. But is that the case here? It appears upon examination of the statute that two steps are necessary. The first is that an agreement or promise or sanction should be made or given by the local authority. They are not instructed by this statute to make agreements with their employees of the nature which would bring the statute into play. It is open to them of their own volition to do so. Perhaps in some cases they can spare men; perhaps in other cases they cannot. They are entitled to decide and determine whether they will make an agreement or not. If they do so agree, it is conceded that after May 17, 1916, the agreement made by them stands good, and stands good by virtue of the powers given to them under the Act of 1916. But it is said that although in its retrospective effect the agreement or promise of a local authority is referred to, that was not the primary factor, but that it arose from the statute. I cannot accept that argument. It appears to me that sub-s. 2 of s. 1 clearly contemplates an agreement or promise or resolution which is so termed, but had not the force of law, by reason of there being a defect in the powers of the local authority. Nevertheless, it is a term, promise, sanction or agreement, and it becomes operative or is reinvigorated or validated if and when the powers under sub-s. 2 of s. 1 are imposed upon it. The retrospective effect of sub-s. 2 of s. 1 was not to give a statutory right to persons such as Aylott to sue, but to provide that where there had been agreements made which purported to be agreements, where there had been promises made which purported to be promises, those

(1) 13 C. B. 826.

promises and agreements should be valid. It appears to me, therefore, that Aylott's claim is not based primarily upon the statute. It is based upon an agreement and promise which was made to him in November, 1914, believed by both parties to be a good and valid agreement, subsequently discovered to be invalid, but made retrospectively valid and binding by virtue of sub-s. 2 of s. 1 of the Act of 1916. There were, as Sargant L.J. put it, two links in the chain which enabled Aylott to bring the claim—namely, (1.) that he should have had an agreement made with him and a promise made to him on the strength of which he took service with His Majesty's forces, and (2.) that the statute gave effect to the agreement which was made between the plaintiff and his employers.

For these reasons it appears to me that Aylott's claim is not one which arises out of the statute. It arises out of the agreement made with him and the promise made to him. The subsequent Act comes into the field merely for the purpose of adding vigour and validity to the agreement which had been made.

For these reasons I think the appeal fails and must be dismissed with costs.

I will only add this: I have said what I have said in response to the able argument of Mr. O'Malley and because no doubt the case is of some importance, perhaps not only to the plaintiff but to others. But quite apart from that I should be content to say that I agree with the judgment of Romer J. I agree with the basis on which it is founded and the conclusion he reached.

WARRINGTON L.J. I am of the same opinion. The learned judge from whom this appeal is brought has held that the plaintiff's action is barred by the Statute of Limitations of James I. at the expiration of six years from the date when any payment sought to be recovered became due. The plaintiff contends that the proper Statute of Limitations applicable to this case is the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42). That statute fixes as the period of limitation twenty years in actions of covenant or debt upon any bond

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or other specialty. In the present case the specialty alleged is a statute and, therefore, in order to bring the action within the Act of Parliament fixing the twenty years' limit, the action must be an action of debt upon the statute.

In 1914 the defendants in consideration of the plaintiff volunteering for service in the army promised to make him certain payments. At the time that promise was made there was no power in the defendants, a municipal corporation, either to make such payments or to agree to make them. If at that time they had had such powers they could only have been derived, if they had them at all, from a statute. It is admitted that the action to recover them would not have been an action of debt upon the statute, but would have been an action of common assumpsit, or debt founded on the promise to pay. It is said that as the promise was made before the passing of the statute of 1916 the action to enforce payment was based upon the statute, and therefore, although the promise and the liability are of exactly the same nature as that to which I have already alluded, in the one case the period of limitation is six years and in the other it would be twenty years. That would be a curious result, but I do not think that is the result in the present case.

The Act in question is the Local Government (Emergency Provisions) Act, 1916. That part of it which is material is s. 1, sub-s. 1, which provides that a local authority may, while any officer or servant is serving "in or with His Majesty's forces for the purposes of the present war . . . . pay to him or his wife or other dependants nominated by him a sum which shall not, without the sanction of the Local Government Board, exceed" a certain amount. If it makes it lawful for them to pay, it makes it lawful for them to agree to pay, and therefore, as to any promise made after the passing of this Act, I think there can be no question that any action would be an action for debt founded upon the promise. But then, by sub-s. 2 of s. 1 provision is made for past cases. That is done in these terms: "This section"—namely, the section which authorizes payment—"shall apply to the case of an officer or servant of a local authority who before the passing

of this Act took service in or with His Majesty's forces with the sanction or permission of the local authority, and any resolution, promise, sanction or permission, passed or given by a local authority to any such officer or servant with a view to his serving in or with His Majesty's forces, shall be binding on the local authority to the extent and only to the extent to which it could have been passed or given if the provisions of this Act had been in force."

The contention is that, inasmuch as the Act made the antecedent promise for the first time binding on the Corporation, therefore the action upon that promise is an action upon the statute. In my opinion that is an entire misconception of the effect of the statute. The action is an action on the contract, upon the promise made in 1914. Without that promise there would be no action at all. All that the statute does is to make that promise binding so that, in case it is not performed, an action may be brought upon it. That, with all deference to the argument addressed to us, is not an action upon the statute. It is an action upon the contract, but an action authorized by the statute which makes that promise a promise binding. That that is so is illustrated very strongly by the cases referred to as examples of what are actions upon the statute. There is the action for calls, which is an action for payment of a sum of money, the liability to pay which is created by the statute and would not have existed without it. The same remark applies to an action for interest on debenture stock. The third example, the only one which has been found, I think, is the case of *Shepherd* v. *Hills* (1), which was an action for payment of certain rates and duties imposed by the statute.

The result is, in my opinion, that the judgment of Romer J. was correct, and that this appeal must be dismissed.

SARGANT L.J. I am of the same opinion. Mr. O'Malley has endeavoured to persuade us that the well known decision of *Cork and Bandon Ry. Co.* v. *Goode* (2) applies here. In my judgment that is not so. If the judgments in that case

(1) (1855) 11 Ex. 55. (2) 13 C. B. 826.

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are carefully looked at, it is quite clear that they turn upon this, that in order to establish liability it was necessary to look at the statute, and at that only. Here it is necessary to look both at the statute and at the antecedent agreement or quasi-agreement which had been made, in fact, although it had not full legal validity, between the Corporation and the particular volunteer who is now claiming.

I will only add this further. Mr. O'Malley was bound to concede this, that if the agreement had been made after the date when the statute had come into operation, the action would be one not founded upon the statute, but founded upon the agreement. In my judgment, the plain effect of the statute here is to put those persons with whom agreements, which were not completely legally binding, had been made before the statute upon the same footing, as regards enforceability, as persons with whom similar agreements were made after the statute was passed.

Appeal dismissed.

Solicitors for appellant: *Mitchell, Lucas & Mitchell.*
Solicitors for respondents: *Hillearys.*

W. I. C.

ROWETT, LEAKEY AND COMPANY *v.* SCOTTISH PROVIDENT INSTITUTION.

C. A. 1926

ASTBURY J.

Feb. 10, 11, 22.

C. A. *May* 6.

[1925. R. 1629.]

Insurance—Life—Company's Head Office in Scotland—English Policy—Suicide Clause—Exception of bona fide "onerous holders"—Technical Meaning in Scotland—Evidence—Admissibility.

On May 6, 1924, the plaintiffs, an English company, insured their debtor's life in the defendants' London office in three policies of 10,000*l.* each, the total 30,000*l.* being considerably less than the debt. The defendants' head office was in Scotland.

Each policy contained a warranty "that the life assured shall not within six calendar months from the date of this policy commit suicide—but such suicide shall not affect the interests of bona fide onerous holders."

On October 1, 1924, the debtor committed suicide. The defendants having accordingly refused payment of the policies, the plaintiffs contended that they were bona fide onerous holders within the exception, and sued for payment:—

Held, by Astbury J., (1.) that the expression "onerous holders" being unknown in English legal phraseology, evidence was admissible to show that its technical meaning in Scotland is equivalent to "assigns for valuable consideration."

(2.) that even if this evidence was not admissible the exception of "bona fide onerous holders" could not have been intended to include parties to the policies, as all such parties were presumably bona fide.

(3.) that the original debt, though constituting a good insurable interest, was not an onerosity attached to the holding within the meaning of the exception, and

(4.) that whether the Scottish evidence was admissible or not the plaintiffs had failed to establish that they were bona fide onerous holders within the meaning of the exception.

Held, by the Court of Appeal, that the contract was unambiguous and could be construed according to English law without resort to evidence of the meaning of "onerous holders" in Scottish law.

Held also, that the words "onerous holders," in their secondary sense, connoted an assignee for valuable consideration, and that to construe the further exception of "onerous holders" as including the original proposer or assured would be to destroy altogether the effect of the main exception of cases of suicide.

Decision of Astbury J. affirmed on this last ground.

WITNESS ACTION.

The plaintiffs were a private English limited company of which John Quiller Rowett was managing director with complete control of the Board, power to prevent transfers

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of shares to any one but himself so long as he was willing to purchase them at a fair value not exceeding the amount paid up thereon, and power to call for a transfer of shares transmitted by death or bankruptcy on similar terms. He held about 80 per cent. of the 135,000*l.* share capital.

On May 6, 1924, Rowett, being indebted to the plaintiffs to an amount considerably over 30,000*l.*, they insured his life at the defendants' London office in three policies of 10,000*l.* each. The defendants' head office was in Scotland.

Each policy contained a warranty "that the life assured shall not within six calendar months from the date of this policy commit suicide, but such suicide shall not affect the interests of bona fide onerous holders."

At the foot of each policy it was stated "The Institution is subject to the jurisdiction of the Scottish, English, and Irish Courts."

On October 1, 1924, Rowett was found lying on the floor of his London house strangled with a window cord round his neck. As the circumstances pointed to suicide the defendants refused payment of the policies.

On July 4, 1925, the plaintiffs commenced this action to enforce payment. The defendants alleged that Rowett had committed suicide.

The plaintiffs did not admit the suicide, and contended that even if the defendants established it, it did not affect the plaintiffs, who, having regard to their admitted insurable interest, were bona fide onerous holders from the start.

On the first point the Court held on the evidence that the defendants had established the fact of suicide.

The second point was then argued, the defendants admitting that the plaintiffs had an insurable interest and that all material facts had been disclosed when the policies were issued, so that the only question was whether the plaintiffs were "bona fide onerous holders."

The action came on for hearing before Astbury J. on February 10, 1926.

Maugham K.C. and *A. D. Gibb* for the plaintiffs. These are English policies taken out in England, and, if possible, the construction must be ascertained from the documents themselves. The word "holders" is quite simple. It includes both original holders and holders by assignment. This is clearly so in the case of a bill of exchange: Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 2, which defines "holder" as the payee or indorsee in possession of the bill, or the bearer thereof; and also in the case of a policy: Assurance Companies Act, 1909 (9 Edw. 7), c. 49), s. 29, which defines "policy holder" as the legal holder for the time being.

The word "onerous" means "burdensome" or "subject to a burden." Now all policies are burdened with premiums, so that read quite generally all policy holders would be onerous holders. It is necessary therefore to limit the meaning for the protection of the insurance company who wish to guard against suicide for the benefit of volunteers taking a self insurer's estate. This protection is fully obtained by reading the words "onerous holders" as meaning holders who, on acquiring the policy as original holders or by subsequent assignment, undertook some outside burden in connection with that acquisition under which they became holders. This clearly excludes the inside burden of paying the premiums, but includes any burden dehors the policy. In the present case the burden was the forbearance to sue for the debt, and the plaintiffs became onerous holders at the start.

If the defendants had wished to confine "onerous holders" to "assigns for value" they ought to have said so expressly or by implication. They could have found many precedents for that purpose: see Macgillivray on Insurance, pp. 864, 865. The clause, if ambiguous, must be construed against the defendants as an insurance company: Porter on Insurance, 7th ed., p. 30. From the point of view of the protection required by the insurance company, what is the conceivable difference between the present case and that of creditors who take a mortgage to secure a past debt, and make the

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mortgagor take out a life policy and assign it to them in the mortgage? Surely this difference is purely formal, and cannot affect the defendants' liability.

The defendants propose to tender evidence that the word "onerous" and the phrase "onerous holders" have a definite technical esoteric meaning in Scotland. This evidence is wholly inadmissible. The contract was made in England, and in the English language. The words "onerous" and "holders" are common English words, and the Court, not the expert, must construe the collocation "onerous holders." The fact, if it be a fact, that it means "assigns for value" in Scotland is irrelevant. It may have quite a different meaning in England. Subject to these objections, which are fully borne out by *Di Sora* v. *Phillipps* (1), the evidence may be taken de bene esse.

[The Right Honourable Hugh P. Macmillan K.C. was then called by the defendants de bene esse to prove that in Scotland "onerous" meant "for valuable consideration" and that "onerous holders" meant in effect "assigns for value." He referred to Erskine's Institutes, Lib. 3, Tit. 2, art. 31n.; Bell's Principles, 8th ed., s. 66; and Goudy on Bankruptcy, 4th ed., pp. 25, 47.]

Clauson K.C. and *Macgillivray* for the defendants. There are three objections to the plaintiffs' claim to come within the exception to the suicide clause: (1.) They are not holders, within the exception. They are original parties to the policies. (2.) They are not onerous holders. (3.) They are not bona fide onerous holders.

As to the first point. The expression "bona fide holders" must exclude parties to the policy, as bona fides is of the essence of every policy, and a party thereto is presumed bona fide.

On the second point. If the Scottish evidence is admitted, cadit quæstio. The plaintiffs are obviously not assigns. If not admitted, the expression "onerous holders" is really meaningless. The onerosity must be connected with the holding. The plaintiffs' attempted construction merely

(1) (1863) 10 H. L. C. 624.

connects it with the insurable interest. It is noticeable that English suicide clauses only protect assigns for value.

[ASTBURY J. Why did the defendants want to exclude third parties with an insurable interest bona fide insuring their debtor's life ?]

Possibly because the actual insurers know all about the life they are insuring. This is all the more reasonable where, as in this case, the insurers and the life are virtually the same. That is really the third point—namely, that having regard to Rowett's large shareholding and practical control of the plaintiff company, Rowett and the plaintiffs were one. The plaintiffs therefore were not bona fide onerous holders within the exception.

Maugham K.C. in reply. The Scottish text-books referred to happened to be dealing with assignment cases, and any definition of the phrase " onerous holders " must be read accordingly, if the evidence is admitted at all.

No doubt if the English Court construes " holders " as " assigns " the case becomes quite easy. But prima facie it obviously includes original holders, as in the case of a bill of exchange. In the case of self-insurance, as I have already explained, " onerous holder " can only mean an assign for value, because premiums do not constitute outside onerosity. But in third party insurance there is no reason whatever why the original parties should not be onerous holders.

As to the point of bona fides. The plaintiff company was a separate entity from Rowett, and the defendants must prove lack of bona fides in the plaintiffs' act of securing their debt as they did. It was their obvious duty to their independent shareholders, and their doing so was prima facie evidence of bona fides.

Cur. adv. vult.

Feb. 22. ASTBURY J. The second issue in this case is whether the plaintiffs are " bona fide onerous holders " of the three policies in question, the life assured having committed suicide within six months from the date of the policies.

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Each policy is in identical terms and contains the following warranty: "That the life assured shall not within six calendar months from the date of this policy commit suicide, but such suicide shall not affect the interests of bona fide onerous holders." The plaintiffs took out these policies on the life of their managing director, who was heavily indebted to them, and the defence of non-disclosure of material facts and no sufficient insurable interest is withdrawn, and the case has been conducted on the footing that the issue as to whether the plaintiffs are bona fide onerous holders has been duly and properly raised.

The insurance contract in this case was an English one, made and to be performed in London, between the plaintiffs, an English company, and the defendants, a Scottish company, and it is construable according to English law. The only question is, what meaning is to be attached to the words "onerous holders"? According to English legal phraseology, and unfortunately for the plaintiffs, these words are in themselves more or less meaningless. A "burdensome" or "troublesome" holder conveys little or no relevant meaning, according to English law. Any clause in the contract excepting the defendants from liability, must, if ambiguous, be construed against them as an insurance company, but in this case the exception, as to suicide, is perfectly plain, and the plaintiffs, in order to succeed, must establish that they are bona fide onerous holders of these policies.

If a Scottish word or phrase is used in the contract, it is, I think, admitted by the plaintiffs' counsel that its Scottish meaning may be explained or interpreted, although expert Scottish evidence may not be called to interpret or construe the sentence or clause in which that word or phrase appears. An eminent Scottish lawyer has been called, and he has proved, subject to any objection that the plaintiffs can rightly raise, that "onerous" in this connection has a clear technical meaning in Scottish law and means therein "for valuable consideration." He also proves, subject to any similar objection, that the phrase "onerous holder" has a clear technical meaning in Scottish law, and means "a person who

by transmission has acquired a right to a document of title for valuable consideration." If this evidence is admissible, and I think it is—there being no English meaning attributable in law to the words " onerous holders "—the plaintiffs must fail, as they are clearly not onerous holders in this sense.

If, however, this evidence is not available to the defendants, the matter has to be considered without its assistance. The plaintiffs contend: (1.) that they took out the policies bona fide, and there is in my judgment no sufficient evidence to the contrary; (2.) that they are the " holders " of the policies; (3.) that they had an onerous insurable interest in Rowett's life; and (4.) that " onerous," not being in this country a legal term of art, should be construed merely as excluding a volunteer. In other words, they contend that there is nothing to exclude a third person, party to the contract, with an insurable interest in the life assured, from recovering, as there are no express words and no necessarily implied inference confining the holder entitled to recover to an assign. They point out that if a man borrows money on mortgage, with a condition attached that he shall insure his life and include the policy in the mortgage, it would be strange if the mortgagee's right to recover on the policy were to depend upon whether he originally took out the policy or had it assigned to him in the mortgage deed. Strange, however, as this might be, it does not seem to me to throw much light on the meaning of the words in question.

I think, however, as the defendants contend, that according to the dictionary meaning in this country of " onerous " one must necessarily turn elsewhere for its true meaning in these policies, and that it cannot be construed as applying to an original insurer, who must prima facie be bona fide and give value, as far as payment of premium is concerned. But the onerosity cannot reside in the payment of premium, because if Rowett himself had taken out the policies, that construction is impossible. Further, the onerosity in question cannot be attributable to any insurable interest, of a party to the contract, in the life assured, as the contract attaches the onerosity to the holding and not to the life. Again, if

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the words had been "bona fide holders for value" they could only have pointed to assigns, and "onerous" as qualifying "holding" cannot fairly be construed to mean anything else. In suicide clauses in English policies, it is the assignee for value who is generally protected, and the idea is very common; but a party to the insurance, with an insurable interest in the life insured, is not protected. This is perhaps only a coincidence, but it shows the trend of practice in these cases. No difficulty of construction arises unless an attempt is made to include an original insurer in the words "onerous holders." This cannot be done if the policy is taken out by the life insured, and if taken out by a third party, there is no available onerosity qua the holding, as payment of the premium will not suffice in that behalf.

For these reasons I am of opinion that, whether the Scottish evidence is admitted or not, the plaintiffs have failed to establish that they are bona fide onerous holders within the meaning of the exception in question, and the action must be dismissed with costs.

G. R. A.

C. A.

The plaintiffs appealed. The appeal was heard on May 6, 1926.

Maugham K.C. and *A. D. Gibb* for the appellants. We cannot contend in this Court that this was not a suicide within the meaning of the policy, but we desire to reserve that question.

This is an English contract negotiated and carried out in London, where the policy was issued by the respondents from their London office. If the respondents desire to carry on their business in London, it is improper for them in their policies to use terms which are to be construed by Scots law. There is nothing to give the proposer notice that the policy is to be so construed; and to call expert Scottish evidence to explain the meaning of a contract made in London is monstrous. We submit that such evidence is wholly inadmissible.

This policy must be construed contra proferentem, and according to the law of the country in which it was made: *Anderson* v. *Fitzgerald* (1); *M'Cowan* v. *Baine* (2); and effect must be given to such intention of the parties as they have used fit words to express; and in case of ambiguity, the party who uses the ambiguous words should suffer: *Borradaile* v. *Hunter*. (3) The policy should be construed, if possible, according to English law; but if that is not possible, then the ambiguous words should be struck out. "Onerous" is an English word, meaning "burdensome," but that word is not apt when applied to the holder of a policy; and an ordinary layman who in London assures his life does not know that it may be a term used in Scottish law. "Holder" is not limited in meaning to a holder by assignment; it may include the original holder or proposer. The Bills of Exchange Act, 1882, s. 2, defines "holder" as "the payee or indorsee of a bill or note who is in possession of it." There is nothing in the phrase "bona fide onerous holders" to denote to an ordinary reader the intention to exclude an original holder or proposer. "Onerous" would apply to a policy taken out under an interest in another's life. *Wainewright* v. *Bland* (4) shows the position where only two persons are concerned in taking out the policy. The object and intention of the policy must be regarded: *Pelly* v. *Royal Exchange Assurance Co.* (5) "Holder" is intended to be left as having a wide meaning, and would include a proposer who takes out the policy on another's life.

Clauson K.C. and *Macgillivray* for the respondents. This policy can be construed according to English law. "Onerous" means primarily troublesome or burdensome, and has a secondary meaning importing acquisition for valuable consideration. No difficulty arises until one assumes that "holder" includes the person who insures. But if "holder" includes the party to the contract, that destroys the whole exception.

Maugham K.C. in reply.

(1) (1853) 4 H. L. C. 484, 507, 510.
(2) [1891] A. C. 401.
(3) (1843) 5 Man. & G. 639.
(4) (1835) 1 Moo. & Rob. 481.
(5) (1757) 1 Burr. 341.

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LORD HANWORTH M.R. [having stated the facts continued:] The action was commenced on July 4, 1925, to recover 30,000*l*., the total sum due under these three policies. The defence was that by reason of the clauses in the policy, and the fact that the death of Mr. Rowett was due to suicide, the insurance company were not liable. Astbury J. heard evidence, and decided in favour of the insurance company, and from that decision an appeal is taken before us. Mr. Maugham does not argue the question whether it was a suicide within the meaning of the policy. As I understand, for the purposes of the appeal to this Court there is some decision which makes it impossible for him to present any argument on that point, although I gather that, if the case goes higher, he desires to reserve to himself the right to question the precise meaning of the term "suicide."

The point that has been argued is that the proviso as to suicide when taken as a whole does not apply to the fact of this death, and does not release the defendants from responsibility. The policy was issued by the Scottish Provident Institution, and before Astbury J. evidence was tendered and was admitted as to the meaning of the provision "but such suicide shall not affect the interests of bona fide onerous holders." Astbury J. had before him evidence as to the meaning of that phrase in Scottish law, and came to the conclusion that it meant "A person who by transmission has acquired a right to a document of title for valuable consideration." It is said by Mr. Maugham that in this case where a contract has been made by a company carrying on business in London, it is not right to admit evidence to show what meaning a phrase in that contract may have in Scottish law; that in respect of a policy issued by a London office, by a company trading in London which has one of its principal places of business, within the meaning of the Policies of Assurance Act, 1867, in London, and issuing a policy at that office, there is no place for an interpretation of something which has a latent ambiguity on its face by evidence as to its meaning in Scotland. I do not think it necessary to determine that point, or to discharge the case

upon that argument: not that I reject the argument that in case of ambiguity evidence of what the meaning is might reasonably be given, and properly admitted, having regard to the fact that the defendant Institution is the Scottish Provident Institution; that it is upon the policy stated that the address of the Institution is No. 6 Andrews Square, Edinburgh; and that it is clearly stated on the policy that the person who is the insured has a right to participate under the Institution's system in the surplus of the common fund; all which matters point, as it seems to me, to the possible occurrence of specially Scottish terms in the policy.

But, in the present case, the contract is one of insurance. It is admitted on both sides that under such a contract the law requires the policy to be taken more strongly contra proferentem, or, in other words, the policy is to be construed ut res magis valeat quam pereat. There is abundant authority for saying that you should put such a construction upon the policy as will give effect to its purpose, rather than by some device seek to invalidate it. The policy is in these terms: "The person named and described in the subjoined schedule and therein called 'the proposer,' having made the proposal and declaration therein mentioned as the basis of this contract, is hereby admitted a member of the Scottish Provident Institution (hereinafter referred to as 'the Institution'); and in consideration of the payment of the first premium mentioned in the said schedule and of the future contributions (if any) as thereby provided, and subject to the laws and regulations of the Institution and to the provisos hereinafter specified, the person or persons to whom in terms of said schedule the sum hereby assured is payable shall" —then, on certain details being carried out—"be entitled to receive out of the common fund of the Institution the sum assured specified in the schedule." The person who is named and described in the subjoined schedule is the person who is the proposer, and that person who is so described as the proposer is the present plaintiff company. In other words, the plaintiffs are what is more commonly in insurance cases described as the assured. The assured then upon this contract

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are prima facie to receive that sum which appears in the schedule, and in each of the schedules of the policy 10,000*l.* is the sum specified. But the contract so made is subject to what is provided in a later paragraph, and the second proviso is this : " The life assured shall not within six calendar months of the date of this policy commit suicide." It is stated in the schedule that the life assured is the life of John Quiller Rowett. Looking therefore at the contract and the second proviso, " that the life assured shall not within six calendar months from the date of this policy commit suicide," that proviso comes into operation because, having regard to the date of the policy and the date of the suicide, Mr. Rowett did commit suicide within that six months. Therefore upon that proviso the liability established by the main clause in the contract ceased to operate, with the result that the policy was avoided. Thus the defence is made out. It is perhaps worth while to remember what is the rule with regard to the onus of proof on either side in the case of a policy and its exceptions. *The Glendarroch* (1) is commonly cited on this point, and it contains a decision by Lord Esher M.R. which is relevant to the present case. The plaintiffs there claimed against shipowners under a bill of lading containing the usual exceptions, and they raised a counter exception suggesting that the shipowners were not entitled to take advantage of the exception by reason of the negligence of the crew. Lord Esher M.R. says : " That being so, I think that according to the ordinary course of practice each party would have to prove the part of the matter which lies upon him. The plaintiffs would have to prove the contract and the non-delivery. If they leave that in doubt, of course they fail. The defendants' answer is 'Yes'"—that is to say, " Yes, there was a contract "—" ' but the case was brought within the exception—within its ordinary meaning.' That lies upon them. Then the plaintiffs have a right to say there are exceptional circumstances, viz., that the damage was brought about by the negligence of the defendants' servants, and it seems to me that it is for the plaintiffs to make out that second

(1) [1894] P. 226, 231.

exception." So we have here contract, exception by means of the proviso, answer or counter answer by the plaintiff: "Yes, but the proviso does not apply by virtue of the second exception which is engrafted upon the first." That second exception is as follows: "But such suicide shall not affect the interests of bona fide onerous holders." It is said, and it is for the plaintiffs to establish, that the second exception brings them back within the policy from which they had lapsed by virtue of the operation of the proviso as to suicide. What is the meaning of this exception? I do not think that it is necessary to invoke Scottish law to construe the words: "Such suicide shall not affect the interests of bona fide onerous holders." Whatever may be the meaning in Scottish law of "onerous holders," what is here provided is that the interests of bona fide holders shall not be affected; I will leave out the word "onerous" for the moment on purpose. If it is to be said that the assured is the holder in the sense that a person who is in possession of a bill of exchange is the holder, then the second exception would in effect cancel the first exception altogether, because the proviso would then mean "provided that the life assured does not within six calendar months of the date of this policy commit suicide, but such suicide shall not affect the interests of the holder," namely, the assured. It would absolutely cancel out all effect of the first exception. That seems to be an impossible interpretation.

I have pointed out that the contract is one under which the assured is entitled to be paid; the assured being the person who has been called the proposer, and who in the present case is the plaintiff limited company. If "holder" is considered in connection with the other words attached to it, it seems to negative the possibility of the assured being included in the category described by those words "the interests of bona fide onerous holders," that is, persons who have become holders bona fide and who have acquired some interest in the policy. That is not an apt way of describing those who are directly entitled to have paid into their hands the sum assured upon the happening of

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the event on which that sum is payable. It appears to me that by no reasonable interpretation of language can those words be apt to mean and to include the assured. The words "interests of bona fide holders" clearly to my mind point to some persons who have become holders by way of transmission and who in that transmission have acted bona fide, and who by that transmission have obtained some interests. If you attach the word "onerous" it seems to be still more plain. That word is an English word. It is used in literature, and is also to be found in s. 23 of the Bankruptcy Act, 1869, and an onerous holder would appear to connote some person who has undertaken and holds responsibility by virtue of or in connection with the policy, holding some burden which he has assumed bona fide but which is the measure of the interests which he has obtained. Quite apart, therefore, from any question of Scottish law or a special Scottish interpretation, the words of the second exception are such as do not, and are not apt to, include the assured.

If that be the interpretation, the plaintiffs are persons who, being named as the proposers, are the persons who are prima facie entitled to receive the sum assured; but the proviso comes into play and discharges the defendants from liability because of the suicide within six months from the date of the policy. Following then the rule in *The Glendarroch* (1) it lies upon the appellants to show that they have under that second exception been brought back into the effect of the policy by the words "Such suicide shall not affect the interests of bona fide onerous holders." For the reasons which I have given, I am unable to find that those words include the assured. The second exception, therefore, does not avail to bring the appellants back into the policy, and I think the decision of Astbury J. was right and the appeal ought to be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. It is the duty of the Court in this case to ascertain the meaning of the

(1) [1894] P. 226.

particular provision in a policy of life assurance. It has been frequently laid down that a policy of assurance is one of those documents which is to be construed contra proferentem, that is to say if the document is in any particular ambiguous and reasonably capable of two constructions, the Court would prefer, of those two, that which is in favour of the assured.

What we have to construe in this particular case is an exception out of an exception in the obligation imposed by the policy. In that case it is for the person claiming the benefit of that second exception to make out that he comes within it, though in doing so, of course regard must be had to the general rule of construction, to which I have just referred. I propose to deal with the case, bearing in mind both those general considerations.

The assurers in the present case happen to be a Scottish institution. I pay no regard to that fact and treat it for the present purposes as immaterial. The assured were a company, of which the life assured was the managing director, who was indebted to them in a considerable sum, and it was the company who proposed the policy and are called the proposers and who paid the premium, they insuring the life of their managing director in respect of the interest which they had in the continuance of that life. There is one other fact; the policy was effected in London, and it is to be performed in London by payment to the proposers, the present plaintiff company.

I will assume that what is technically referred to as the proper law of the contract is, in such circumstances, the English law, and that the contract must therefore be construed according to English law. I repudiate altogether the notion that I am going to construe this contract by the help of any evidence as to the mode in which it would be construed in a Scottish court. But I repudiate no less strongly the notion that when an English word occurs in a contract, the tribunal which has to ascertain the meaning of that word is not at liberty to make use for that purpose of any materials which it possesses. Especially is that the case when the word in

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question is obviously not used in its primary and literal sense. When it is used in some secondary or figurative sense it may be necessary to ascertain from external sources what that figurative or secondary sense is, and I am quite clear that the tribunal is entitled to rely either upon its own knowledge, derived from education or literature, of the meaning of the English language, or upon the knowledge of learned men who have compiled dictionaries of the language, or even upon knowledge derived from evidence given in the particular case.

I now turn to the document which we have to interpret. It provides for the payment of the sum assured to the proposer, in this case the company of which the life assured was the managing director, and it is made in consideration of a premium paid by the proposer. Pausing there for one moment, although the only person named as the person to whom the payment is to be made is the proposer, it is quite plain that the parties to this contract contemplated the possibility of the money having to be paid to some assignee of the policy. Now it is the law of this country, and is by this time well known to persons engaged in such transactions, that a policy of assurance is assignable. That fact is recognized in this policy by the statement at the top of the policy. The company in the terms of the provisions of the Policies of Assurance Act, 1867, say: "it is hereby notified that the principal places of business at which notices of assignment may be given are Edinburgh, London and Dublin." It is clear, I think, that when the policy provides for payment to the proposer both parties must be taken to have assumed that it might be payable to some one other than the proposer.

I now come to the clause in question: "Provided that the life assured shall not, within six calendar months from the date of this policy, commit suicide "—that is what I have just described as the exception to the general liability of the assurer—" but such suicide shall not affect the interests of bona fide onerous holders." That is the exception to the exception, and it is for the plaintiffs to bring themselves within its words. In my opinion, leaving out for the moment

the word "onerous," that sub-exception does not extend to the person who, in this case, is called the proposer. So to construe it would be, in effect, to destroy the effect of the first exception altogether, because the proposer may be assumed to be bona fide; for if he is not, the policy would be void. He may be, he is in a sense, the holder, and, therefore, if the expression is so wide as to extend to him it would destroy the exception altogether, and if it extends to the proposer who, in this case, is not the life assured, it must logically extend to the proposer where he is the life assured; and if that is so, it reduces to an absurdity the suggestion that the exception to the exception is as wide as is contended for.

But now I turn to the word "onerous." Without saying for the moment what, in my opinion, is the meaning of the word, it obviously restricts the class of holders to which the exception is to apply. It is not to be every holder; it is only to be an onerous holder. There again, the proposer, even where he pays the premium, cannot, in my opinion, be said to be any more an onerous holder than the life assured who also pays the premium; it is only the payment of the premium which enables the person who pays it to obtain the amount insured. Then, lastly, what is the meaning of "onerous holders"? The primary meaning of "onerous" is burdensome, or troublesome, or inconvenient, or difficult. You may talk about an onerous property, meaning a white elephant. You may talk about an onerous task, meaning one which requires great effort to perform. You may talk about an onerous obligation—namely, an obligation which imposes a serious burden upon the person upon whom it falls. But with regard to the holder of a policy, none of those meanings, no application of the primary meaning of the word "onerous," would be available. You must find some secondary meaning. It immediately suggests the notion of a burden, of a difficulty, of an obligation—something to that effect. How are you to apply that in a secondary sense to the holder of the policy? I can think of no way except by applying it to the means by which he becomes the holder. If you apply it to that, then the matter becomes quite clear.

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He becomes a holder by means of some obligation which he has incurred, some burden which he has placed upon himself, whether it be the payment of money, or some other detriment. He has obtained it in some other way than as a mere gratuity. Then the conclusion, to put it now in legal language, would be that " onerous holder " is, according to our English terms, an assignee for valuable consideration, and in my opinion that is the true meaning, and clearly the true meaning. I do not consider, when you come to look carefully at this, that it is a matter of ambiguity at all. I think that is the true meaning of the policy, and consequently I agree that this appeal fails, and must be dismissed.

SARGANT L.J. I am of the same opinion. It is no doubt quite true, and Mr. Clauson has not contested the view, that if there is an ambiguity in the language used in a policy, the ambiguity is to be construed against the person who is responsible for the language of the policy, who is in almost all cases the maker of the policy, the company who issue the policy, as stated at p. 853 of Mr. Macgillivray's book on insurance law. But there is also this to be considered, and I think this statement, which occurs on the same page, is fully justified : " The above rules, however, are not to be used to create ambiguity where none exists." For that proposition *Coles* v. *Accident Insurance Co.* (1) is cited, but a very good example of the principle is to be found in *In re United London and Scottish Insurance Co., Brown's Claim* (2), decided after that book was written, where the exception was against death by inhalation of gas, and there were a good many words in the policy which might have indicated that the inhalation of gas that was aimed at was a voluntary inhalation. The learned judge who had to decide the case in the Court of first instance, had taken that view, but the Court of Appeal reversed the decision, and came to the conclusion that although the deceased had died from an involuntary inhalation of gas, the words were reasonably clear, and they were bound to give effect to the language of the policy.

(1) (1889) 5 Times L. R. 736. (2) [1915] 2 Ch. 167.

Therefore the first thing one has to consider—the first thing from certain points of view—is this: Is there any real ambiguity in the language of this policy with regard to this particular question? In my judgment there is not. It seems to me that the policy is reasonably clear on this point. The policy provides that the insurers shall not be liable if the life assured shall, within six months, commit suicide. That is a perfectly clear and unambiguous exception, and there is no doubt whatever that that event did occur, the life assured did commit suicide within five months of the issue of the policy, and therefore prima facie the company was not liable so far.

Then come these words, which form an exception to the exception: "but such suicide shall not affect the interests of bona fide onerous holders." Obviously it is for the assured to show that that which happened was within the exception to the exception. What is the meaning of "affect the interests of bona fide onerous holders"? Who are bona fide onerous holders within that exception? Mr. Maugham has contended that the words "bona fide onerous holders" are sufficiently wide to include the person with whom the contract was originally made, the original assured. It seems to me, for the reasons that have been given, that the effect of that will be in many, if not in all, cases to render the exception from the exception so wide as to destroy the exception altogether.

As to what is the meaning of "onerous holders" it seems to me that it is not necessary to have recourse to the evidence of Mr. Macmillan or even, perhaps, to the statement made in the Oxford Dictionary. I by no means say that the evidence is not perfectly admissible for the purpose of showing that there is a secondary sense in which that word "onerous" is used, if the primary sense in which it is used according to the English language is not applicable to the subject-matter of the phrase in which it is used; but apart from that, Mr. Maugham's argument practically came to this, that onerous meant burdensome, meant not merely voluntary. Further, we have to consider whether the exception from the exception, which is in these terms: "But such suicide shall not affect

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the interests of bona fide onerous holders," applies not merely, as one would have thought, to persons deriving a title under the original assured, but to the assured himself. There are many difficulties in the way of that view. The words " bona fide " seem to have little, if any, meaning at all in that connection, because the person who has taken out the policy and paid the money is presumably bona fide, and, of course, if there were any fraud in connection with the matter the policy would be avoided quite independently of any clause of this kind; and the word " holder," although in a certain sense it may be said to comprehend the original proposer, is certainly not used with regard to the original proposer in any other place in the document, and is not a word very apt to denote the original contractor.

It appears to me that in construing such words as these we must have regard to this fact, that with regard to many contracts it is recognized by the commercial community that there is a great advantage in enabling a person to give to one with whom he deals a better title to certain subject-matters of contract than he has himself; that is so with regard to commercial documents such as bills and cheques. It is so, of course, with regard to money, cash, and so on, which is made negotiable for the benefit of the general community, and this enables a person who is in possession of money, although he may be a thief, to transfer a perfectly complete title to somebody with whom he deals for value. In my opinion, in this document the words in the collocation in which they occur do point to an effort to enable a person who derives title as a contractor, as an original assured under the document, to transfer a good and complete title to somebody with whom he had to deal, and to whom it may be important that he should be able to give a good title.

In my judgment, reading the document as a whole and paying attention to the considerations that I have mentioned, there is no real or definite ambiguity in the particular clause in question, and the words of the exception from the exception mean this, and this only, that although the original assured is liable to have his policy avoided should the life assured

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commit suicide within six months, yet if that policy has been transferred, or charged, or dealt with in favour of some subsequent holder who takes bona fide and for value, then the liability to forfeiture of the policy in the hands of the original assured shall not be extended to the subsequent holder, but that subsequent holder shall take discharged from that occasion of forfeiture. I agree that the appeal should be dismissed.

Solicitors for appellants: *Elvy Robb & Welch.*
Solicitors for respondents: *Linklaters & Paines.*

R. M.

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June 10, 11, 14, 15, 16, 17; *July* 12.

HORTONS' ESTATE, LIMITED *v.* JAMES BEATTIE, LIMITED.

[1926. H. 604.]

Easement—Ancient Lights—Obstruction—Nuisance—Quantum of Light left—Standard the same in manufacturing and country districts.

It is an actionable nuisance to obstruct an ancient light so as to cause a room to be inadequately lighted for ordinary purposes. The measure of what is sufficient light is not different in manufacturing and in country districts.

WITNESS ACTION.

The plaintiffs are the owners of a freehold property called the Joiners' Arms fronting to the north on Darlington Street, Wolverhampton. On the west it abuts on a street called Townwell Fold, and on the east on the next-door premises in Darlington Street. On the south it abuts on an alley, on the other side of which is a garden. Except for a low wall and certain trees in the garden there is an unobstructed access of direct light from the south to a window, an ancient light on the ground floor of the Joiners' Arms. The window was the sole means of lighting a room in the Joiners' Arms. The defendants proposed to erect, at a distance of five yards from the window, a building 42 feet 6 inches high, extending

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right across the plaintiffs' premises and Townwell Fold. The result would be that the room would be deprived of all direct light from the south, and would only have such light as reached the window from the south-west diagonally across Townwell Fold. So far the building has reached a height of 30 feet. The room is now inadequately lighted for ordinary purposes. In more than half the room, on a day with a sky brightness, measured direct, of 600 ft. candles, the light falls below ·4 per cent. of the unobstructed sill light, with a resultant illumination below 1 ft. candle.

The plaintiffs asked for an injunction restraining the defendants, their officers, contractors, agents and workmen from erecting or maintaining any building on the land of the defendants adjoining and situate on the south side of the plaintiffs' premises so as to cause a nuisance to the plaintiffs' ancient window in the said premises as the same existed before the commencement of the erection of the building now being erected by the defendants on their said land.

Sir Herbert Cuncliffe K.C. and *E. Ackroyd* for the defendants. It is admitted that this is an ancient light. To constitute an infringement of the right to light the obstruction complained of must amount to such a nuisance as to render the occupation of the room uncomfortable according to the ordinary notions of mankind: *Colls* v. *Home and Colonial Stores.* (1) In considering whether the decrease in light constitutes a nuisance the standard of comfort prevailing in the locality must be taken into account: *Rushmer* v. *Polsue and Alfieri, Ld.* (2) Much turns on the nature and locality of the window, the supply of light to which has been interfered with. Persons who live in towns cannot expect the same volume of light as those who live in the country: *Clarke* v. *Clarke* (3); *Kine* v. *Jolly* (4); *Charles Semon & Co.* v. *Bradford Corporation.* (5) Even if this room be inadequately lighted according to ordinary standards the evidence shows

(1) [1904] A. C. 179, 185, 187.
(2) [1906] 1 Ch. 234.
(3) (1865) L. R. 1 Ch. 16.
(4) [1905] 1 Ch. 480, 498.
(5) [1922] 2 Ch. 737, 742, 749.

that it is adequately lighted according to the standard prevailing in Wolverhampton, a manufacturing town, and therefore no actionable wrong has been committed. The amount of light to be left is not to be tested by any hard and fast standard, but by reference to the general standard of light in the district.

Bennett K.C. and *G. M. Simmonds* for the plaintiffs. If this building is erected according to plan will there be sufficient light left to render the occupation of this room comfortable according to the ordinary notions of mankind? If there is not then the House of Lords has decided in *Colls* v. *Home and Colonial Stores* (1) that an actionable wrong has been committed, and the plaintiffs are entitled to the injunction asked for. It is submitted that the evidence shows that if the building is erected as proposed by the defendants the room will be left without sufficient light for ordinary use and enjoyment.

Cur. adv. vult.

July 12. RUSSELL J. The question for consideration is not the quantum of light taken away but the quantum left behind. In my opinion the plaintiffs have clearly proved that if the defendants erect their proposed building this room will not have sufficient light for ordinary use and ordinary enjoyment. A great point was made by the defendants that even though the evidence established that the room would be inadequately lighted according to ordinary standards, yet a different standard must be applied to a room situated in a manufacturing town such as Wolverhampton, and that even though it were badly lighted it would still be no worse off than other back rooms in the same neighbourhood. Accordingly it was said that no actionable wrong would be committed. I am unable to accede to this argument. It is true that there are to be found in some of the reported cases references to locality in regard to nuisances by noise and smell, and occasionally in regard to obstruction to light, but I know of no reported decision establishing that an obstruction

(1) [1904] A. C. 179.

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to an ancient light which renders a room inadequately lighted and causes an actionable nuisance, ceases to be an actionable nuisance if the locality is shifted. In default of any binding authority to this effect I decline so to hold. The standard of lighting required to survive in order to eliminate the existence of a nuisance seems to me of necessity an absolute standard. The human eye requires as much light for comfortable reading or sewing in Darlington Street, Wolverhampton, as in Mayfair. True, no doubt it may be that as a rule buildings are more crowded together in manufacturing districts than in residential neighbourhoods. Lights have been obstructed, and no doubt where they have been ancient compensation has been accepted. True, no doubt it may be that an adequately lighted ground floor back room is a rare find in a manufacturing district. I can see, however, no reason in this for saying that a man whose room in such a locality has been turned into a room no longer adequately lighted for ordinary purposes has not suffered an actionable wrong. I grant the injunction asked for.

Solicitors : *Redfern & Co., for Redfern & Co., Birmingham ; J. M. Quiggin & Son, Liverpool.*

J. B. B. M.

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In re BOULTON BROTHERS AND COMPANY.

Ex parte G. A. MONCRIEFF (A BANKRUPT) *v.* OFFICIAL RECEIVER.

Ex parte F. H. CRIPPS (A BANKRUPT) *v.* OFFICIAL RECEIVER.

Ex parte W. W. BOULTON (A BANKRUPT) *v.* OFFICIAL RECEIVER.

Bankruptcy—Discharge—Suspension—"Contracting a debt provable in the bankruptcy without any reasonable or probable ground of expectation of being able to pay it"—Joint and several Guarantee by Partners of their Firm's existing Debt—Certificate—Bankruptcy caused by "misfortune without any misconduct"—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 26, *sub-ss.* 2 (*ii.*), (*iv.*), 3 (*d*), 4.

The partners of a firm, which was heavily indebted to the firm's bankers, formed a limited company to take over the debt. They then, with the consent of the principal creditors of the firm, gave the bank a joint and several guarantee for payment of the transferred debt and of any sums due to the bank from the company. Upon the subsequent bankruptcy of the firm and the individual partners:—

Held, by the Court of Appeal, that the bankrupts had by the guarantee contracted a "debt provable in the bankruptcy without having at the time of contracting it any reasonable or probable ground of expectation of being able to pay it" within cl. (*d*) of s. 26, sub-s. 3, of the Bankruptcy Act, 1914, and that their discharge must be suspended for a period of two years, but the Court, upon the particular facts of the case, granted each appellant partner a certificate that his bankruptcy was "caused by misfortune without any misconduct on his part," the certificate to operate when the discharge took effect.

Clause (*d*) of s. 26, sub-s. 3, covers not only a new and original debt, but also a debt in renewal of or in substitution for a previously existing debt.

Circumstances which may constitute "misfortune without any misconduct" within s. 26, sub-s. 4, of the Act, discussed.

THESE were appeals by G. A. Moncrieff, F. H. Cripps and W. W. Boulton respectively, from an order made by the Registrar in Bankruptcy upon their applications under s. 26 of the Bankruptcy Act, 1914, suspending their discharge for the period of two years.

The material facts were as follows:—

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The bankrupts had been members of "Boulton Brothers," a firm of traders in the City of London, largely connected with India. As appeared from the report made after the public examination of the debtors, the position of the firm in June, 1920, was a favourable one, there being a surplus of assets over liabilities of some 300,000*l.*, a large part of which was invested in industrial securities, then standing at a high value, but which subsequently suffered a great depreciation.

In the month of July, 1920, the senior partner, R. G. Boulton, entered into very large speculative transactions in trade bills in India. He used for that purpose, and ultimately lost, the proceeds of securities which had been deposited as cover for those transactions. The firm was thereby involved in a liability, exceeding half a million sterling, to the Alliance Bank of Simla. That debt remained a debt of the firm and, therefore, a debt provable against the joint estate of the firm until the two guarantee transactions hereinafter mentioned. By November, 1920, the firm had given up trading, and the Alliance Bank of Simla had taken over control of their assets and liabilities.

In June, 1921, the firm registered a private limited company, called Boulton Brothers & Co. (London), Ld., for the purpose, if possible, of carrying on such of the business of the firm as it was possible to restart and carry on at a profit. On June 30, 1921, a guarantee signed by R. G. Boulton and by the appellants, G. A. Moncrieff and F. H. Cripps, but not by the appellant W. W. Boulton, was given to the Alliance Bank of Simla guaranteeing a sum of 566,372*l.* and also moneys which should at any time he due to the bank from Boultons. That guarantee was given with the assent of the leading creditors of the firm, including the bank, and had the effect of substituting for the joint liability of the firm to the bank the liability of the limited company and the joint and several liability of the several partners, except W. W. Boulton.

In August, 1922, with a view to placing Boulton Brothers & Co. (London), Ld., in a position to trade by removing from it the incubus of the bank's debt, arrangements were made,

again with the assent of the principal creditors, the effect of which was to discharge that debt so far as that limited company was concerned, and to transfer the debt to a new limited company called G. W. F. Trust, Ld. The partners of the firm, including the appellant W. W. Boulton, signed a joint and several guarantee for the sum of 596,076*l.* to the Alliance Bank of Simla and for any sums which might be due to it from the G. W. F. Trust, Ld. It was this guarantee which was said to be a debt provable in bankruptcy contracted by the bankrupts without having at the time of contracting it any reasonable or probable ground of expectation of being able to pay it within s. 26, sub-s. 3 (*d*).

All these efforts to keep the business going failed, and the receiving order was made on October 29, 1924. The application for the discharge was made by the three appellants in December, 1925. The reason for the long delay was that the public examination, which was commenced in February, 1925, was adjourned, because a prosecution was instituted against R. G. Boulton and the appellants G. A. Moncrieff and F. H. Cripps. In the case of the last named appellants the judge at the trial came to the conclusion that there was no evidence to go to the jury, and they were discharged. R. G. Boulton was acquitted upon the charge made against him.

Upon the question of the grant of a certificate under s. 26, sub-s. 4, on the ground that the bankruptcy was caused by misfortune without any misconduct, the following further facts concerning each of the three appellants were material:—

The appellant Moncrieff had nothing to do with the matters which ultimately brought about the downfall of the firm, and had no communication at all with India. He made a strenuous effort to assist the firm, and pledged his estate in Scotland, and there was a claim against him in his separate bankruptcy in respect of the balance for which that estate was an insufficient security. During the critical time in the firm's affairs he was on a well earned holiday in Scotland after years of work in India, and was not taking part in the business of the firm.

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The appellant Cripps had been for some time in Russia attending to the Russian business of the firm, and when war broke out in 1914 he rejoined his regiment and served abroad, being wounded at Gallipoli and in hospital for eight months afterwards. He was demobilized in July, 1919. He had no knowledge of the Indian business or of any of the transactions which brought the firm to ruin.

The appellant W. W. Boulton joined the firm in 1911, and went to India in March, 1920, returning to this country for a few days in November, 1920, and then went back to India until July, 1922. There was no charge made against him at all in the report made after the public examination of the debtors.

All three appellants, when making a declaration of their separate assets, had returned them at figures which were exceeded upon realization, and had rendered the official receiver as exact assistance as they could.

It appeared from the report that the losses of the firm were due partly to the great depreciation in value of the industrial securities held by it in June, 1920, but mainly to the arrangement for developing the purchase of bills of exchange, the losses on which amounted to 125,000*l.*, all of which transactions were in the hands of R. G. Boulton.

Upon the application for discharge by the three bankrupts, Moncrieff, Cripps and W. W. Boulton, the registrar was of opinion that some of the facts mentioned in s. 26, sub-s. 3, of the Bankruptcy Act, 1914, had been proved, and considered himself bound to suspend the discharge for a period of not less than two years.

The bankrupts appealed from the decision of the registrar, and also asked the Court to grant them a certificate that the bankruptcy was caused by misfortune without any misconduct on their part, under s. 26, sub-s. 4. The appeal was heard on May 10, 1926.

Roland Oliver K.C. and *Sir Cassie Holden* for the appellant Moncrieff. The guarantees of June, 1921, and August, 1922, did not constitute any new debt on the part of the guarantors,

but were in effect only the carrying on of the old debt under a later form, and were the result of the previous transactions, and they did not alter the relationship of the parties by whom all the facts were known and who consented to the transaction.

The provisions of sub-ss. 2 and 3 of s. 26 are of a penal character, and we submit that the Court should regard the substance of the transaction, and that the continuance of the old liability under a different form does not come within the scope of cl. (*d*) of sub-s. 3. That is the material clause, for unless the appellant can show that he does not come within it, any other clause or fact will not arise for consideration.

The breach by this appellant of the condition involved in cl. (*d*) was a technical breach only, and even if the debts contracted by the guarantees come literally within cl. (*d*), yet in commercial substance they were not new debts, and no breach was intended. It was not because a debt coming within cl. (*d*) had been incurred that the assets were less than ten shillings in the pound within cl. (*a*); the assets would have been less than that if these contracts had not been made, and there was otherwise an enormous outstanding liability.

There was nothing on the part of this appellant which would not come within the meaning of "misfortune without any misconduct on his part" as interpreted in *In re Lord Colin Campbell* (1), and we ask for a nominal judgment as alternative to two years' suspension and for a certificate under sub-s. 4.

W. N. Stable for the appellant Cripps adopted the same line of argument.

Hansell for the appellant W. W. Boulton. Under the present state of the law a discharge must either be suspended for a two years' minimum if any of the facts mentioned in s. 26, sub-s. 3, of the Bankruptcy Act, 1914, have been proved, or a nominal judgment has been entered under para. (iv.) of sub-s. 2.

The circumstances of this bankruptcy were such that this appellant cannot justly be held responsible within cl. (*a*) of

(1) (1888) 20 Q. B. D. 816.

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s. 26, sub-s. 3, of the Act, but before coming to that clause he must show that he is outside cl. (*d*) of the same sub-section, and prove that he has not contracted any provable debt without having at the time of contracting it any reasonable or probable ground of expectation of being able to pay it. In these matters the Court of Bankruptcy looks at the substance of the debt rather than at the remedy for it. There can be no double proof against one estate in respect of one debt, and although the contract may be different, and the remedy and security for, and the amount of, the debt may all be different, yet the Court looks at the nature and substance of the debt. If that is so as against his estate, how much more ought the principle to be applied when the Court is construing a penal section which deprives the debtor of his civil status for two years ?

In this case Boulton Bros. were never discharged, but the form only of the remedy was changed. As regards the principal debtor the debt was considered as the same debt, and not a new debt. In the circumstances I submit that the debt does not come within cl. (*d*), and if that is so then the Court has an absolute discretion as to the term of suspension; but if it is not so, then the Court can adopt the alternative course under para. (iv.) of sub-s. 2.

Whatever order of discharge is made, this appellant's conduct has not been reprehensible or such as to disentitle him to a certificate under sub-s. 4.

Tindale Davis for the respondent, official receiver. The order of the registrar was right. When once a fact within cl. (*d*) is established, there is no alternative to suspension for two years. Except in the case of the appellant Cripps there was no suggestion of the alternative method of a nominal judgment. The registrar had no option but to find cl. (*d*) fully established. Up to November, 1920, the liability of the firm was a joint liability, but in consequence of the guarantee then given there have been six proofs—one against the firm and one against each of the five debtors—and it became a case to which Lord Loughborough's Order applied: Williams' Bankruptcy Practice, 13th ed., p. 189.

In re Dutton, Massey & Co. (1) shows how strict the rule is as between joint and separate estates.

This was a debt contracted within cl. (*d*). When the new company was formed the guarantee was a wholly new contract.

[LORD HANWORTH M.R. We need not trouble you any more on cl. (*d*).]

The course of a nominal judgment under s. 26, sub- s. 2 (iv.), is alternative only to this extent, that the debtor must offer to submit to judgment and must make the offer before the registrar has given his judgment.

Under s. 26, sub-s. 4, where a certificate is given, I submit that the discharge on which it is given must be an immediate discharge. The order for discharge and the certificate, if made now, would not operate until the expiration of two years. In the circumstances of this case there was no misfortune on the part of the appellants within the interpretation given to that word in *In re Lord Colin Campbell.* (2)

LORD HANWORTH M.R. stated the facts and continued: This is an appeal from the decision of the registrar, who, upon proof of some of the facts under sub-s. 3 of s. 26 of the Bankruptcy Act, 1914, has felt himself bound to suspend the discharge for a period of not less than two years. He has not refused the discharge altogether, but has adopted the alternative of suspension for not less than two years. He did so because of there being proof of the facts catalogued in clauses (*a*) to (*l*) of sub-s. 3. It is unnecessary to discuss cl. (*a*), which deals with the event of the assets being less than ten shillings in the pound, because cl. (*d*), as Mr. Oliver confessed, would be fatal to his application if he is unable to put a different construction upon it in law from that which has been put upon it by the registrar. I, therefore, will not discuss cl. (*a*), because it is not necessary, and therefore it would be unwise to attempt to define or illustrate the meaning of the words "cannot justly be held responsible," in circumstances in which we have not to determine what

(1) [1924] 2 Ch. 199. (2) 20 Q. B. D. 816.

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those words mean as applied to the present facts. I turn therefore to cl. (*d*). That is in these terms: "That the bankrupt has contracted any debt provable in the bankruptcy without having at the time of contracting it any reasonable or probable ground of expectation (proof whereof shall lie on him) of being able to pay it."

Mr. Oliver has argued, and the counsel appearing for the other appellants have adopted his argument, that the meaning of those words is "contracted any new debt provable in the bankruptcy." It is said that if you turn back to the balance sheet of June, 1920, you find the firm in a secure position, and that what happened thereafter was the collapse of the industrial securities, and still more, the failure of the bill transactions, and that at the same time the loss on the exchange, which must not, of course, be overlooked in a matter of losses on bills of exchange, was over 200,000*l*. It is said that this really was the old misfortune, and that what befell thereafter was merely something which happened in black misfortune's baneful train. There was no new contract, it is argued, in signing the guarantee of June, 1921; it was merely a guarantee which was necessitated by the facts of the case, and had the object and perhaps the merit of preventing a disaster at that time, it may be, not only to the firm, but possibly to other trading companies or firms also; and that later, when the guarantee of August, 1922, was signed, it was nothing but a carrying on of an old debt; it was not contracting a debt, it was the old debt, the old responsibility, under a later form. I cannot accept that view. The word "new" does not find a place in this cl. (*d*). No doubt the clauses in sub-s. 3 overlap. For instance (*c*): "That the bankrupt has continued to trade after knowing himself to be insolvent." That is not found or relied upon in the official receiver's report. No doubt (*c*) to some extent covers what appears in (*d*), but it appears to me that the importance of (*d*) is this, that once a trader or a firm have discovered that they are really insolvent they ought not to continue to trade or purport to carry on, because they may incidentally involve those who

engage with them in trade in still greater losses; that a trader's duty is to face the position and to cut the loss and not to contract any debt, even though his object may be possibly laudable or prudent, and possibly a wise one. But he is debarred from contracting a debt provable in bankruptcy without the risk of the consequences which have followed in the present case.

At the time when the two successive guarantees were signed it is clear that there was no reasonable or probable ground of expectation of the bankrupt's being able to meet them unless, as is found by the registrar, and, indeed, as was stated by one of the members of the firm, there was a revival in the industrial securities. The applicant, R. G. Boulton, stated that when these guarantees were given the firm's only expectation of meeting them was out of a business revival, and so far from there being a business revival the story of the last twenty-four months was of a continued shrinkage and loss. It appears, therefore, that in fact there was a debt contracted by these undertakings. I reject the limitation which is proposed to be put to that sub-section, that it means a debt independent of a renewal of an old debt. I will not digress for the purpose of indicating what may be involved more than to say this; in bankruptcy we are familiar with the case in which a debtor ultimately finds himself compelled to go into bankruptcy after having renewed bills to moneylenders or to others successively over a considerable period of time, renewals which involve the capitalization of debts accruing for interest during successive periods. The purpose of cl. (*d*) is to prevent that sort of continuance, a continuance on hope not on business, which may involve others in serious losses in consequence of the trader continuing when he ought to call a halt. It therefore appears to me that one of the facts catalogued in sub-s. 3 has been established, and that these three bankrupts have contracted debts provable in their bankruptcy without having at the time of contracting them any reasonable or probable ground of expectation of being able to pay them.

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I then come back to see how that fits in with the result on sub-s. 2. The position is this: that on the proof of that one fact under cl. (*d*), the registrar had only open to him the course of refusing the discharge or suspending the discharge for a period of not less than two years. I say those two courses, for I do not think upon the facts before us that any serious suggestion was made by the bankrupts of an offer to consent to judgment being entered up against them respectively on which the registrar could have acted, or on which he would have found himself able to adopt the alternative in sub-cl. (iv.). For these reasons Mr. Registrar Coldridge was quite right in saying that the suspension of the discharge must be for a period of not less than two years.

That being so, the further point is made by all three appellants that a certificate should be granted under sub-s. 4. [His Lordship read the sub-section and continued:] We are asked to grant a certificate under that sub-section with a view to removing statutory disqualification. By the Act of 1883 it was provided in s. 32: "Where a debtor is adjudged bankrupt he shall be disqualified for" a great number of active public positions, sitting or voting in the House of Lords down to the humbler, though perhaps not less important, offices of holding the office of guardian of the poor, overseer of the poor, member of a sanitary authority, member of a school board or a highway board or select vestry. In 1890 that disqualification was limited to a period of five years from the date of the discharge.

One must regard this sub-s. 4 as a whole. The disqualification is a very serious one. It is an added penalty to any citizen or member of the community to make it impossible for him for the period of five years to take his part as a citizen, it may be in a parish, town or county, or it may be in a larger sphere; from taking any active part, which most Englishmen do desire to take, in what are called public affairs. Sub-s. 4 quite clearly indicates that there are circumstances under which that disqualification shall be limited. It is to be limited if a

certificate is granted that the bankruptcy was caused by misfortune without any misconduct on his part. There is a contrast made between misconduct and misfortune. *In re Lord Colin Campbell* (1) is the only case in which that section has been seriously considered by the Court, and Lord Esher M.R. said: "It is impossible to give an exhaustive definition of the meaning to be attached to 'misfortune.' I think, however, we must hold that, when the bankruptcy is not solely the result of some accident over which, or over the direct conducing causes of which, the debtor has no control, it cannot be said to arise from 'misfortune.'" It appears to me that what Lord Esher meant is that we ought in considering "misfortune" to reject active conduct on the part of the debtor from being included in the word. But I think also that we must consider "misfortune" in relation to the purposes for which it is used—namely, the removal of a statutory disqualification. It must be put in its true perspective. Fry L.J. said: "It appears to me that what the Legislature had in view in this proviso was, the possibility of there being cases in which a man might become a bankrupt without thereby raising a presumption of his unfitness for holding a public position."

It is, I am quite sure, unwise, as Lord Esher M.R. said, to attempt to give a definition of the meaning to be attached to the word "misfortune." It can be illustrated only by particular cases. I think that the present case would form no precedent for another case. Each of these applications must be judged according to its particular facts, and I doubt very much whether it will ever be possible to found an application in other circumstances at another time upon the facts which have occurred in a previous or in the present case. But in this case, taking all the facts into consideration, the attitude and behaviour of the bankrupts during the bankruptcy and the real history of their activities during the time when R. G. Boulton was unfortunately carrying on the business of the firm unknown to either of them, it appears to me that we may quite fairly upon the

(1) 20 Q. B. D. 816, 821, 822.

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facts presented in this case say that, as relevant to this sub-section and for the purpose of removing the statutory disqualification, we may grant a certificate and say that the bankruptcy of these three appellants was caused by misfortune.

I should not be prepared to say that a mere investment, perhaps unwisely made, which falls in value indicated simpliciter misfortune. There might be cases in which it might be so, but I do not rely upon that. What appears to me to be relevant to the present application is this: that all these three appellants had no knowledge of, indeed I doubt if they had any control over, the matters which enured to their disaster. They have all taken the part that they did take without any loss of honour on their part, and two of them have been discharged in the circumstances that I have already recounted after their conduct had been submitted to the severe examination necessary in a criminal trial. In those circumstances it appears to me that if one is to use the sub-section and is to consider that there may be cases where misfortune is contrasted with misconduct, this is a case in which one may find that the bankruptcy was caused by misfortune, because you have the clear antithesis that it was without misconduct.

In these circumstances and for these reasons I think that the certificate can be granted, but on the main point it is impossible for us to vary the order which has been made by the registrar that the discharge must be suspended for two years. It is perhaps unfortunate that owing to the delay necessary in the circumstances the effect of the two years should run for so long a period, but it must not be forgotten that the bankruptcy was a very serious one, and caused, I have no doubt, a good deal of loss to other persons; and those who have been engaged in an important position as traders must know that if bankruptcy supervenes there must be, when such large figures are involved, a necessary delay in the elucidation and winding up of the affairs of the firm and of the estate. The certificates will operate at the time when the discharge takes effect.

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WARRINGTON L.J. It is not denied that if this is a debt within the meaning of cl. (*d*) of sub-s. 3, not one of the three debtors had any reasonable or probable ground of expectation of being able to pay it. The contention is that it is not, within the meaning of cl. (*d*), a debt provable in bankruptcy contracted by the bankrupts. It is said that before the signing of the guarantee, certainly before the signing of the guarantee of 1921, there was this debt owing by the bankrupts; that the only effect, so far as they were concerned, of the signature by them of those guarantees was to alter the form of the debt, so that instead of its being a debt in respect of which they were the principal debtors, it became a debt in respect of which they were sureties only. It is said that that is not the contracting of a debt provable in the bankruptcy within the meaning of the section. On the construction of the section, the only qualification attaching to the debt, the contracting of which has been proved, is that it shall be a debt provable in bankruptcy. There is no such qualification as that it must be a new and original debt, and not a debt in substitution for or in renewal of a previously existing debt. I should find it difficult, if I were driven to express a view on the construction of the section, to convince myself that I must introduce into the section as expressed any such qualification or limitation as that for which the appellants have contended. But I am not driven to that course, because I think it is now made quite clear that the debt was not a mere renewal in another form of the old debt. By execution of the guarantee the debts first became a claim upon the separate estate of the several partners and provable in the bankruptcies upon their separate estates. That fact, having regard to the well known rules in reference to the separate administration in bankruptcy of the joint estate of bankrupts and of their separate estates, makes a most material difference to the condition of those estates respectively. Whatever view might have been taken if the debt had remained only a joint debt, having become a separate debt it is in effect, for the purposes of administration in bankruptcy, a fresh debt provable now by virtue of that contract,

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and for the first time provable against the separate estate of the bankrupts. For these reasons it seems to me that it is impossible to bring the case outside cl. (*d*), that it has been proved that the fact mentioned in that clause has been established, and that, therefore, the registrar was right, and in fact had no alternative except to suspend the discharge for two years.

But then it is said that although, if the discharge is to be suspended the suspension must last for two years, there was an alternative open to the registrar, which was that he might require as a condition of the discharge the consent of the bankrupt to judgment being entered against him as mentioned in para. (iv.) of sub-s. 2. In my opinion no really substantial application of that kind was made to the registrar nor, if it had been, would it in my judgment have been right to accede to it. The practice now under para. (iv.), if it is resorted to at all, is that the judgment shall be entered for merely a nominal sum, which shall be paid or discharged at once, so that the discharge will take effect without any real suspension. This is not a case in which I think the registrar would have been justified in taking that course. I say nothing about other cases. I think the real answer to the present suggestion is that no real application of the kind was made to the registrar at the time. The result is, in my opinion, that the order of the registrar suspending the discharge for two years must stand.

Then there comes another question which has to be determined, and that is whether under sub-s. 4 of s. 26 the Court can and ought to grant the bankrupts respectively a certificate to the effect that their bankruptcies were caused by misfortune without any misconduct, so as to remove the disqualification imposed by the Bankruptcy Act of 1883, which is still in force in that respect, modified by the subsequent Bankruptcy Act of 1890. The Court must be satisfied that the bankruptcy was caused in respect of each of these three bankrupts (and I confine my remarks to them alone) by misfortune without misconduct. It is clear that there was no misconduct in the case of either of these bankrupts, but it does not follow that because there was no misconduct

therefore the bankruptcy must be attributed purely to misfortune. That point was settled by *In re Lord Colin Campbell* (1), to which my Lord has already referred. But I do think that in the case of each of these three bankrupts their bankruptcy was caused by misfortune. Now what really caused the bankruptcy ? I think it may safely be said that their bankruptcy was caused partly by the collapse of the industrial securities at the end of 1920 and partly, and I think even more, by the dealings of their senior partner, R. G. Boulton, and his speculations in the Indian exchange. Was that a misfortune to them ? I think it was. Not one of these bankrupts had any knowledge of what was going on.

The only way in which it can be said, I think, that in the case of these three appellants the bankruptcy was not due to misfortune would be, if it could be really established, that they were responsible for and had brought about the misfortune by leaving the particular business from which the misfortune arose to the conduct of their senior partner. I do not think that that can properly be said. The business had been conducted with profit for many years under the guidance of R. G. Boulton. Not one of the three had the least reason to suspect that he would be guilty of any rash or hazardous speculation. They had every reason, on the contrary, for trusting to his prudence and discretion. I think, therefore, that on the whole it would be hard upon them to make them responsible to the extent of refusing a certificate for having left to R. G. Boulton the conduct of the transactions in question.

I think, therefore, on the whole that under the facts proved in this particular case, which must not, I think, be treated as in any way a precedent in other cases in which the facts are different, it would not be right to decline to find that the bankruptcy was caused by misfortune and so to refuse a certificate. I think that the Court ought to grant a certificate, but it must, of course, operate from the time when the discharge takes effect, that is at the end of the two years' suspension.

(1) 20 Q. B. D. 816.

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SARGANT L.J. I am of the same opinion, and I will limit my remarks to two points only—first, the meaning of cl. (*d*) of sub-s. 3 of s. 26 of the Bankruptcy Act, as applied to this case; and, secondly, the question of the granting of the certificate under s. 26, sub-s. 4. Mr. Oliver in his able argument laid great stress upon the penal character of sub-s. 3. He practically invited us to limit the operation of cl. (*d*) to a case where a bankrupt had contracted a debt which he had no reasonable probability of discharging, so as to hurt the creditor with whom he was dealing. He invited us really to say that if the creditor with whom he was dealing knew all the facts of the case, and had no reason to suppose that the bankrupt could not discharge the debt, and particularly if the debt so contracted was really the result of previous transactions under which a liability had arisen, that then in that case the language of cl. (*d*) did not apply. In my opinion that cannot be so. The language is quite explicit; it is not limited by any considerations of the kind suggested by Mr. Oliver. It is to be remembered that the contracting of a debt which cannot be discharged does not only prejudice the person with whom the contract is made, but prejudices the other creditors of the bankrupt, who in consequence of that debt are compelled to accept a smaller dividend. If it were to be said that you are to look at the origin of the debt, it seems to me that hundreds of cases would be exonerated which are clearly within the clause. If a person has contracted a debt with a moneylender, and then before the debt becomes due finds that his resources are exhausted, and that he cannot possibly pay, it seems to me that the clause would clearly apply if then he proceeded to give fresh bills to the moneylender for a principal sum, including the interest on what had already been lent to him and including interest on that principal sum. Here, for myself, I altogether fail to understand the argument, which says that all these transactions under which the firm was relieved and the limited company was substituted, the firm becoming a surety only, and under which for the limited company a second limited company was afterwards substituted, are to be regarded as

sham transactions or transactions which did not alter the relationship of the parties. I think it must be taken that those transactions were real transactions, and were carried out in a very definite and businesslike way, and that when as a result of them you find the firm becoming liable for gradually increasing sums and, above all, becoming liable not only jointly but on a separate liability, which has the result of making the other creditors of their separate estate, who otherwise would have been paid in full, receive a dividend of one halfpenny in the pound—it seems to me then that the mischief at which the clause is aimed has been done. Therefore, in my judgment, we must hold here that although the transactions were entered into with the full knowledge of the particular creditors, so as not to harm them in any way, and are transactions not involving the slightest moral turpitude, yet these transactions did amount to contracting debts within cl. (*d*). If so, it was admitted by the counsel for the three applicants here that the debts were debts which they had no prospect at all of paying.

Turning to sub-s. 4 of s. 26 I want to say this: it is certainly my own view, and I think the other members of the Court take the same view, that the certificate we are granting is founded on this—it may be a benevolent view to take—that the downfall of the firm was caused by the speculations that were entered into by R. G. Boulton without the knowledge of the other partners and without any reasonable opportunity for them to have become acquainted with the speculations. I say that for this reason, that if the downfall of the firm had really been occasioned by the carrying of a great load of industrial securities on an insufficient margin, I do not think the fact that the depreciation which overtook those securities was unexpected would be a sufficient circumstance on which to come to the conclusion that there had been a misfortune within the meaning of that sub-section, because I think that persons must be deemed to know that depreciations, and depreciations to a considerable extent, may take place in the securities they hold, and if they are holding them on a margin it may well be that the margin

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will run off and a liability ensue. Nor do I think it would be a sufficient answer, if the partners had simply left the conduct of the business in the hands of R. G. Boulton without any kind of supervision, and then having trusted him to that extent their confidence had turned out to be misplaced, because it seems to me that persons are not entitled to repose excessive trust in other persons, even though they are partners, when they have a fair opportunity of looking into matters for themselves. But in the particular circumstances of this case, as affecting each of the three appellants, it seems to me that they were in positions either of being away from the country or of enjoying a well earned holiday, as Warrington L.J. said, after a very long time spent in India, or being necessarily exclusively engaged in other branches of the business of the firm not connected with the branch in which these speculations took place.

I think on the whole that in this particular case, having regard to all the circumstances and attributing, as I think we do, the downfall of the firm to the conduct of R. G. Boulton, it may be said properly that these three appellants were partners who suffered from a misfortune, and it is quite clear that they were not guilty of any misconduct. Limiting myself, therefore, strictly to the circumstances of this case, it seems to me that the Court is entitled and ought to grant the certificate that has been applied for.

Solicitors for the appellants: *Drake, Son & Parton; O. L. Richardson; Tarry, Sherlock & King.*

Solicitor for the respondent: *Solicitor of Board of Trade.*

R. M.

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[3 of 1926.]

Bankruptcy—Married Woman—Professional Singer—Music Hall Turns—Contract—Singer paid fixed Sum and providing and paying Assistants—Carrying on a "trade or business"—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 125, *sub-s.* 1.

By the Bankruptcy Act, 1914, s. 125, sub-s. 1: "Every married woman who carries on a trade or business, whether separately from her husband or not, shall be subject to the bankruptcy laws as if she were a feme sole."

The debtor, a married woman and professional singer, had up to May, 1925, been engaged in musical comedy, but had subsequently produced scenae and vocal acts at various music halls. In the production of these scenae she had required certain accessories in the way of dresses, etc., in respect of which she had incurred liabilities. On the hearing of a petition against her for a receiving order a number of contracts with music-hall proprietors were put in evidence, from which it appeared that in consideration of a fixed sum per week she undertook to sing and to engage and pay one or more singers to assist her in the production of her scenae, and also to provide and pay an accompanist. The registrar dismissed the petition on the grounds that s. 125 of the Bankruptcy Act, 1914, did not include profession or occupation under the term "business"; that "trade" and "business" were ejusdem generis and intended to bring within the scope of the Act women who were actually trading or carrying on a business in the nature of a trade, and that the fact that the debtor was assisted by another singer and a pianist did not make her any the less a professional artist than when she acted on the stage. On appeal:—

Held, that the debtor was carrying on a continuous occupation for the purpose of making profits by entering into contracts under which she bound herself to produce scenæ on the stage and to provide the necessary accessories in the way of assistant singers and accompanist, and that in those circumstances she could properly be described as carrying on a business within s. 125 of the Act.

Appeal from an order of Mr. Registrar Francke dismissing a petition for a receiving order against the debtor.

The petition was filed on January 2, 1926, and alleged that the debtor, a married woman, had under her stage name carried on the trade or business of a scenae (1) producer for six months and more last past at the London Coliseum,

(1) [*Sic*, not "scenes," in the papers, signifying music-hall vocal turns not being part of any larger work.]

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St. Martin's Lane, in the county of London, and at divers other places; that the debtor was justly and truly indebted to the petitioning creditors in the sum of 294*l.* 18*s.* 3*d.*, being the amount then remaining due on a final judgment obtained by them against her in the King's Bench Division on July 14, 1925, for 404*l.* 8*s.* 3*d.* judgment debt and 11*l.* 5*s.* judgment costs, on account whereof she had paid to them the sum of 120*l.* 15*s.*, leaving the sum of 294*l.* 18*s.* 3*d.* unpaid and due.

The judgment was obtained in an action brought to recover the sum of 404*l.* 8*s.* 3*d.* for the price of certain dresses and goods supplied to the debtor by the petitioning creditors for the purposes of her productions.

The act of bankruptcy alleged was the failure to comply with a bankruptcy notice issued against her by the petitioning creditors on November 17, 1925.

On March 13, 1926, the debtor gave notice of her intention to oppose the making of a receiving order and to contend that she had not in the county of London or at all carried on the trade or business of a scenae producer or any trade or business for six months last past or at all, and that she was not then carrying on any trade or business.

At the hearing before the registrar a number of contracts entered into between the debtor and various music hall proprietors, which were all more or less in the same form, were put in evidence. Under those contracts the debtor undertook to appear and perform in vocal acts in which she was to be assisted by a named artist. The debtor was to pay the artist and also to provide and pay the accompanist out of the money received by her under the particular contracts.

The registrar in dismissing the petition said that he did not believe that the object of s. 125 of the Bankruptcy Act, 1914, was to include a profession or occupation under "business," but that "trade" and "business" were ejusdem generis and intended to bring within the scope of the Act women who were actually trading or carrying on a business of the nature of a trade. From her own evidence the debtor only went on and sang songs with a man which she had sung

before on the stage. The fact that she was assisted by another singer and a pianist did not seem to him to make her any the less a professional artist than she was when on the stage.

The petitioning creditors appealed. The appeal was heard on June 25, 1926.

Clayton K.C. and *E. W. Hansell* for the appellants. It is submitted that the respondent in acting as she does is carrying on a "trade or business" within the meaning of s. 125, sub-s. 1, of the Bankruptcy Act, 1914. That sub-section provides that "Every married woman who carries on a trade or business, whether separately from her husband or not, shall be subject to the bankruptcy laws as if she were a feme sole." If this were a case of an isolated transaction there might be no trade or business, but looking at the number of contracts into which the respondent has entered, if what she is doing is a trade or business she is carrying it on. In most cases she has contracted not merely to sing, but to bring with her another singer and provide an accompanist. She is taking part in and producing music hall turns, and in so doing, it is submitted, is carrying on a business. The contrast between ordinary stage performances and music hall turns is striking. The respondent is not an employee, for she chooses her own songs and does not take her orders from the management. Further she engages to pay the persons she engages to assist her in her productions. If what she is doing is not a trade it is at least a business. It is conceded that the profession of a singer is not a business within the meaning of the section. But the respondent, although a professional singer, is carrying on a business which involves her in liabilities to creditors for the necessary accessories to render her production successful.

The authorities show that "business" has a much wider signification than "trade": *Doe* v. *Keeling* (1); *Smith* v. *Anderson* (2); *In re Collins* (3); *Rolls* v. *Miller* (4); Halsbury's

(1) (1813) 1 M. & S. 95, 100.
(2) (1880) 15 Ch. D. 247, 258.
(3) [1925] Ch. 556.
(4) (1884) 27 Ch. D. 71, 76, 78.

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Laws of England, vol. ii., p. 173, § 281. The question of what is a business is one of fact and of degree. A married woman who contracts debts while carrying on a business is regarded as carrying it on until she has paid them all: *In re Clark.* (1)

[They also referred to Married Women's Property Act, 1882, s. 1, sub-ss. 1, 5; Bankruptcy Act, 1883, s. 152; Bankruptcy and Deeds of Arrangement Act, 1913, s. 12, sub-ss. 1, 2.]

W. T. Monckton for the respondent. This is an attempt to extend the liability of a married woman by making her liable to bankruptcy proceedings in respect of a debt which is not a trade debt. In *In re Allen* (2) the only point decided was that the debt there in question was a trade obligation. There is no case which decides that a married woman can be made bankrupt except in respect of a trade debt. It is only qua trader that she can be made liable to bankruptcy proceedings.

On the question whether the respondent is carrying on a business it is submitted that the registrar has come to a correct conclusion on the construction of s. 125—namely, that it does not include business in its widest sense and that it excludes profession. Business in its usual sense does not include profession. Cases like *Rolls* v. *Miller* (3), which deal with the meaning of trade or business in covenants in leases, have no application to the present case. There the object of the covenant has to be considered and the meaning of trade or business construed with reference to that object. In *In re Wilkinson* (4) Roche J. expressed the view that a "business" did not include an occupation, profession or calling by which the person engaged in it sought his livelihood or practice, and it is submitted that that view is correct. Here the contracts into which the respondent entered in no way modified her character as an artist. She was an individual salaried person. The only deviation from the ordinary contract for acting was the provision as to providing

(1) [1914] 3 K. B. 1095.
(2) [1915] 1 K. B. 285.
(3) 27 Ch. D. 71.
(4) [1922] 1 K. B. 584, 587.

assistance by another voice and an accompanist. It would naturally be convenient that an artist should choose her own accompanist. The decisions as to the meaning of "business" in the various Acts must be read secundum subjectam materiam. It is submitted therefore that the Court ought not so to extend the meaning of business as to include all professions.

LORD HANWORTH M.R. This is an appeal from an order made by the registrar refusing a receiving order and discharging a petition presented by the creditor against the debtor. The act of bankruptcy was the failure to comply with a bankruptcy notice founded on a judgment obtained in respect of a debt incurred by the debtor to the petitioning creditors, for which they had obtained a regular judgment. There is no question raised as to the proceedings up to the service of the bankruptcy notice. On March 13, 1926, a notice was given by the debtor of her intention to dispute the petition. The petition was heard before the registrar in May, 1926.

The debtor is a married woman, and the application for a receiving order was made against her in reliance on sub-s. 1 of s. 125 of the Bankruptcy Act, 1914, which provides that "Every married woman who carries on a trade or business, whether separately from her husband or not, shall be subject to the bankruptcy laws as if she were a feme sole." It is said on behalf of the debtor that she was not carrying on a trade or business, and, that though she is a married woman, s. 125 is not applicable to her.

The facts are these. The debtor is a person well known as a comedy artist and has a professional name under which she acts on the stage. Up to May, 1925, she was engaged in musical comedy, but since that time she has produced scenae and vocal acts. In the course of producing these scenae she required certain accessories in respect of which she became involved in liabilities. A number of contracts have been produced under which she undertook to supply in particular cases one or more assistants and to pay them

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to assist her in the production of the scenae and under which she also undertook to provide such properties as were required for their proper production. In some cases she agreed to supply the necessary accompaniment to her musical scenæ and at rehearsals to supply something in the nature of a band. It is clear therefore that she was contracting not solely for her own services, but also for the provision of additions and properties to make the scenae more effective, and that involved in addition to her own personal services the services of other artists, and in course of obtaining these properties and services of assistants it was necessary for her to pay for them and thereby to incur liabilities. Her artistic performance is added to and enhanced by these accessories and by the services of those she employs. It is said that she is not engaged in a business but is still only a professional artist and is not carrying on a business within the meaning of s. 125 of the Act of 1914. I do not wish to derogate from her status; she is no doubt entitled to be described as a professional artist; but the question is whether when so engaged she is within the terms of s. 125 carrying on a trade or business.

Sect. 1, sub-s. 5, of the Married Women's Act, 1882, provided that "Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole," and it will be noticed that the sub-section referred only to the carrying on of a trade. The Bankruptcy Act, 1883, s. 152, confirms that position; but in the Bankruptcy and Deeds of Arrangement Act, 1913, the responsibility of a married woman was enlarged by the addition of the words "or business" to the word "trade" in s. 12, sub-s. 1, of that Act, and that extension to business is also repeated in s. 125 of the Bankruptcy Act, 1914. When in the Bankruptcy Act, 1914, the words "trade or business" were used, s. 1, sub-s. 5, of the Married Women's Property Act, 1882, had been repealed. The intention of these amendments was to enlarge the sphere of responsibility of a married woman.

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It is clear from a consideration of the cases that the addition of the word "business" has added much to the scope of the word "trade" when used alone. In *Smith* v. *Anderson* (1) Jessel M.R. said: "It is unnecessary to refer to authorities to show that 'business' has a more extensive signification than 'trade.'" Again in *Rolls* v. *Miller* (2) Cotton L.J. said: "I cannot read the two words 'trade' and 'business' as synonymous." It is clear, therefore, that the Legislature intended to add to the sphere of the responsibility of a married woman. The registrar took a different view, holding that the words "trade" and "business" were ejusdem generis. Perhaps he did not have the opportunity of considering these cases. He said: "I do not believe that the object of s. 125 of the Bankruptcy Act, 1914, was to include profession or occupation under 'business' and that 'trade' and 'business' are ejusdem generis and intended to bring within the scope of the Act women who are actually trading or carrying on a business in the nature of a trade. From her own evidence she only goes on and sings songs with a man with whom she has sung before on the stage. The fact that she is assisted by another singer and a pianist does not seem to me to make her any the less a professional artist than when she was on the stage."

We have to consider whether the activities of this lady were such that she can be said to have been carrying on a business. It is a question of fact, but it is difficult to see why she should be immune from bankruptcy proceedings, as she has in the course of carrying out her contracts to incur liabilities to traders, though that fact in itself may not be sufficient. In *Rolls* v. *Miller* (3) Lindley L.J. said that a private family who, on premises which were subject to a covenant not to carry on a trade or business thereon, had their meals cooked in the ordinary way by a cook could not possibly be said to be within the covenant, showing that the purchase and cooking of the ordinary necessaries of life were not such as to bring the case within a covenant not to carry

(1) 15 Ch. D. 247, 259. (2) 27 Ch. D. 71, 85.
(3) 27 Ch. D. 71, 87.

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on a business. In *Smith* v. *Anderson* (1) Jessel M.R. said: "Then taking the last edition of the Imperial Dictionary, which is a very good dictionary, we find it a little more definite, but with a remark which is worth reading: 'Business, employment; that which occupies the time and attention and labour of men for the purpose of profit or improvement.' That is to say, anything which occupies the time and attention and labour of a man for the purpose of profit is business. It is a word of extensive use and indefinite signification." That such has been the trend of the authorities for a long period is shown by the judgment of Le Blanc J. given in 1813 in *Doe* v. *Keeling* (2), in which he said: "I do not think that the meaning of the parties can be fairly confined to trade, because they have used in addition the word 'business'; which must be intended of something not falling within the description of trade." And he proceeded to decide that a school fell within the terms of the covenant. That being the true interpretation of this word, is an exception to be made on the ground that the person is or claims to be a professional artist?

It is useful to call attention to the fact that in the Finance (No. 2) Act, 1915, the terms of s. 39 are: "The trades and businesses to which this Part of this Act applies are all trades and businesses (whether continuously carried on or not) of any description. . . . ." There the word "business" is used in the same sense as explained in *Rolls* v. *Miller* (3) and *Smith* v. *Anderson* (4), to which I have referred. It is plain therefore that the word "business" is used in a comprehensive sense, and that is made more clear by the words of sub-cl. (*c*) of s. 39: "any profession the profits of which are dependent mainly on the personal qualifications of the person by whom the profession is carried on and in which no capital expenditure is required, or only capital expenditure of a comparatively small amount." Those provisions appear to me to indicate that a profession may be included by the word "business," and that if when using

(1) 15 Ch. D. 247, 258.
(2) 1 M & S. 95, 100.
(3) 27 Ch. D. 71.
(4) 15 Ch. D. 247.

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the word "business" it is desired to exclude profession, profession should be expressly mentioned. Therefore this lady is brought within the terms of s. 125 by what she is engaged in. In my judgment the registrar has taken too narrow a view of the meaning of that section. There is in my judgment no reason why a receiving order should not be made, for this lady's activities seem to involve liabilities to others of a nature which ought to be solved by process of the bankruptcy laws. The appeal will be allowed with costs and a receiving order made.

SCRUTTON L.J. This is an attempt to make bankrupt a married woman who has shown a capacity for incurring debts and not discharging them. The registrar has however declined to make a receiving order against her and the creditor appeals to this Court. Whether the registrar is right or not depends on the proper construction to be put upon s. 125 of the Bankruptcy Act, 1914, which provides that every married woman who carries on a "trade or business," whether separately from her husband or not, shall be subject to the bankruptcy laws as if she were a feme sole. The question therefore is whether this lady carries on a "trade or business." In the progress of legislation on this subject the immunity formerly enjoyed by a married woman has been cut down. By the Married Women's Property Act, 1882, she was made liable to the bankruptcy laws only if she carried on a trade, but by later statutes that liability was extended to the case where she carried on a trade or business. I cannot agree with the registrar that the two words "trade" and "business" mean the same thing. Originally a married woman could only be made liable if she was trading separately from her husband, but now she is liable whether she is trading separately from him or not. The word "trade" is often confined to buying and selling commodities. Where to draw the line between what is a profession and what is a trade is a matter which it is not possible to deal with by any general definition. "Business" is a much wider term than "trade." The

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word "business" at least covers a continuous occupation involving liabilities to others, and it is difficult to see the reason why a married woman should not be liable to the ordinary consequences of the bankruptcy laws if she incurs liabilities and does not meet them.

It is said that s. 125 of the Act of 1914 applies only to such debts as are incurred in the course of trading, but the section does not say so. I agree with the view expressed by Wright J. in *In re Dagnall* (1) that "a married woman who trades separately is to be subject to the bankruptcy laws in respect of all debts incurred by her in the period during which she was carrying on the trade." He was there construing s. 1, sub-s. 5, of the Married Women's Property Act, 1882, which did not include the word "business" in addition to the word "trade." If that is the meaning to be given to s. 125 what is it that the debtor has done? She was at one time an actress in musical comedy relying upon her personal gifts. She changed from that to the production of scenae, for which she receives a fixed sum, out of which she pays persons to assist her in the acts and also pays for her costumes, for extra scenery, and possibly, in certain cases, for band parts. She is carrying on a continuous occupation for the purpose of making a profit and enters into contracts by which she binds herself to give or put on the stage such productions and provide for the extras I have mentioned. That in my view comes well within the word "business." I am not going to decide to what extent purely personal service known as professional is within the section. In the circumstances of this case I am satisfied the debtor is carrying on a business within the meaning of the section.

RUSSELL J. I am of the same opinion. The question is whether this particular debtor is carrying on a business within the meaning of s. 125 of the Bankruptcy Act, 1914. She is engaged in giving performances on the stage involving the incurring of liabilities and is paid a fixed sum, and after paying what is necessary for the production of the scenae contracted

(1) [1896] 2 Q. B. 407, 411.

to be produced she retains the balance as her profits. In these circumstances in my opinion this debtor can properly be described as carrying on a business within the meaning of the section.

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Appeal allowed.

Solicitors for appellant: *Finnis, Downey, Linnell & Chessher.*

Solicitors for respondents: *Withers, Bensons, Currie, Williams & Co.*

W. I. C.

LONDON AND SOUTH AMERICAN INVESTMENT TRUST, LIMITED *v.* BRITISH TOBACCO COMPANY (AUSTRALIA), LIMITED.

TOMLIN J. 1926 *June* 30; *July* 30.

[1925. P. 1501.]

Company—Shareholder—Australian Income Tax—Deduction from Dividend payable to British shareholding Company—Contract—Locality—Validity of Deduction—Commonwealth of Australia Constitution Act, 1900 (63 & 64 *Vict. c.* 12)—*Income Tax Assessment Act*, 1915–1918 (*Australia*)—*Income Tax Assessment Act*, 1921 (*Australia*).

An English trust investment company held 3712 ordinary 1*l.* shares in the defendant company, also an English company with a registered office in London, and deriving its revenue entirely from its shares in four companies carrying on business exclusively in Australia. The defendant company had its head office and board of directors in Australia, but had also a register of shares in London. The defendant company having been assessed to Australian income tax was required by the Deputy Federal Commissioner of Taxation, in accordance with s. 50A of the Income Tax Assessment Act, 1915–1921, of the Australian Commonwealth, to deduct an amount sufficient to pay the income tax from the dividend payable to the English trust investment company, as being an "absentee" taxpayer for the year ending June 30, 1921. The investment company sued the defendant company for the amount deducted, and contended that such dividends were not assessable to Australian income tax:—

Held, that the shares held by the plaintiff company in the defendant company were locally situate in England, and that the dividend due in respect of them was an English debt. The Commonwealth Government had therefore no power to impose or alter the incidence of taxation upon

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the dividend, and the defendant company was not entitled to deduct any Australian income tax from any dividend payable to English shareholders.

Spiller v. *Turner* [1897] 1 Ch. 911 and *Indian and General Investment Trust, Ld.* v. *Borax, Consolidated, Ld.*, [1920] 1 K. B. 539 followed.

WITNESS ACTION.

The plaintiff company brought the action to recover from the defendant company the sum of 67*l.* 18*s.* deducted from a dividend payable to the plaintiff company on 3712 ordinary 1*l.* shares which it held in the defendant company, being a sum representing an assessment of Australian Commonwealth Income Tax on the plaintiff company in respect of income derived from sources within Australia during the year ending June 30, 1921, and made by the Deputy Federal Commissioner of Taxation for Australia under the provisions of s. 50A of the Income Tax Assessment Act, 1915–1921.

The writ was originally issued in the name of Mr. A. D. Pass as a co-plaintiff with the company, but the assessments against him having been withdrawn, his name was removed from the record.

The facts and the material provisions of the Australian income tax statutes are fully stated in the judgment of the learned judge.

Maugham K.C. and *Cecil W. Turner* for the plaintiffs. The Australian Government can tax the defendant company, but they cannot tax the plaintiff company, which is not a trading company, but a shareholding company domiciled in England. It is ultra vires the Commonwealth Government of Australia to impose taxation upon shareholders domiciled and resident in England in companies incorporated in England. The Australian Government have purported to authorize the defendant company to pay less than its debt to the plaintiff company by deducting the tax. That may be valid in the Australian Court, but the debt being locally situate in England it is wholly invalid here, and it exceeds the powers conferred on the Australian Government by the Commonwealth Act, 1900 (63 & 64 Vict. c. 12): *McLeod* v. *Attorney-General for*

New South Wales (1), per Lord Halsbury. A colonial Legislature cannot affect the rights of parties which are governed by English law.

It has always been said that the Courts of this country will never enforce the revenue laws of other countries.

[They referred to *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* (2); *Spiller* v. *Turner* (3); *Indian and General Investment Trust* v. *Borax Consolidated, Ld.* (4)]

Sir John Simon K.C. and *Theobald Mathew* for the defendant company. We concede that the legislation of Australia, unlike that of the Imperial Parliament, is subject to a territorial limit, but the question comes to this—what is the place where the asset is situated? For all taxation purposes the defendant company must be treated as resident in Australia, although it is an English corporation.

The Australian Income Tax Assessment Act, s. 50, has the effect of a garnishee order. For the purposes of satisfying a tax on Australian income, a person resident in Australia who owes a debt to the taxpayer is required by the Act to deduct the amount of the tax and pay it to the Commonwealth Government, and that is a good discharge of the debt: *Swiss Bank Corporation* v. *Boehmische Industrial Bank.* (5) The debt is one situate in Australia: *Rex* v. *Lovitt* (6); Dicey's Conflict of Laws, 2nd ed., pp. 309–311. There is nothing in *Spiller* v. *Turner* (7) to show that the company in that case was resident in Queensland: the test is not where it carries on business, but where the head office is situated: *Delage* v. *Nugget Polish Co.* (8) In that case there was an agreement between an English and a French company for the former to pay the latter a percentage of its gross receipts, and the English company deducted income tax from the amounts, because it was compelled by the Crown to do so.

The case of *Indian and General Investment Trust* v. *Borax Consolidated, Ld.* (4), is distinguishable from the present in the

(1) [1891] A. C. 455, 458.
(2) [1894] A. C. 670, 683.
(3) [1897] 1 Ch. 911.
(4) [1920] 1 K. B. 539.
(5) [1923] 1 K. B. 673.
(6) [1912] A. C. 212.
(7) [1897] 1 Ch. 911.
(8) (1905) 92 L. T. 682, 683.

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third sentence in the headnote. In that case the rights of the parties were to be regulated by English law, under the express contract between them. Here the contract between the plaintiffs and the defendants, resident in Australia, is impliedly affected by the Australian law.

[TOMLIN J. The defendant company does not actually carry on business in Australia, but is a purely holding company.]

In the absence of an express stipulation to the contrary, the shareholder cannot be said to have a contract with the company, that the company shall ignore the local law, and treat it as if it did not exist.

For the purposes of taxation a company may have more than one residence: *Swedish Central Ry. Co.* v. *Thompson.* (1)

Cecil Turner in reply. These are both English companies and the contract between them is English, and Australian legislation cannot intervene between the parties to impose any such obligation as is attempted to be done here.

Cur. adv. vult.

July 30. TOMLIN J. The plaintiff company is an English limited company incorporated under the English Companies (Consolidation) Act, 1908, and carries on the business of a trust investment company. At all material times the plaintiff company has had its registered office, business and management in England, and has been (*a*) the holder registered upon the English register of shareholders of 3712 ordinary shares of 1*l.* each in the defendant company, and (*b*) the holder of 5108*l.* consolidated ordinary stock in a company called the Australian Pastoral Co., Ld. The plaintiff company has always been and is liable to pay British income tax on dividends received from its investments. The defendant company is also an English limited company registered under the English Companies Acts, 1862 to 1900, and has, and has always had, its registered office in London. It is not a trading company, but derives its revenue from its holdings of shares

(1) [1925] A. C. 495.

in other companies. Its objects are stated in clause 3, sub-clause 1, of its Memorandum of Association to be as follows: "To acquire and hold either in its own name or by its nominees, shares, stocks, bonds, obligations and securities issued or guaranteed by any company constituted or carrying on business in the United Kingdom of Great Britain and Ireland, or in any colony or dependency or possession thereof, or in any foreign country, and debentures, debenture stock, bonds, obligations, and securities issued or guaranteed by any Government, sovereign, ruler, commissioners, public body or authority, supreme, municipal, legal or otherwise, whether in the United Kingdom or abroad, and to exercise all rights and privileges appertaining thereto respectively, and to become subject to all liabilities and obligations attaching thereto respectively." At all material times the shares in other companies held by the defendant company have consisted of shares in four trading companies carrying on business exclusively in Australia, and the defendant company has had its head office and board of directors in Australia and declared its dividends in that country, having, however, an English register as well as an Australian register of shareholders with a London Committee for certifying and passing or rejecting transfers of shares other than those on the Australian register. It does not pay British income tax.

The object of this action (which, as I understand, is in the nature of a test action) is to obtain the payment of a sum of 67*l.* 18*s.* deducted by the defendant company, in circumstances which I will presently explain, from the sum payable on March 31, 1923, to the plaintiff company as holders of 3712 ordinary shares in respect of a dividend declared by the defendant company upon its ordinary shares for a period beginning subsequent to June 30, 1922. The defendant company had declared a dividend of 12 per cent. on its ordinary shares for the year ending June 30, 1922, and the amount payable to the plaintiff company in respect thereof was in due course received by the plaintiff company.

On February 10, 1923, the Deputy Federal Commissioner of Taxation for Australia, affecting to act under the powers

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of the Income Tax Assessment Act, 1915–1921, of the Commonwealth of Australia, sent to the plaintiff company a letter enclosing what purported to be an assessment on the plaintiff company to Australian income tax for the year ending June 30, 1922, in respect of income derived from sources within Australia during the year ending June 30, 1921, and informing the plaintiff company that as it was in his opinion difficult to collect the tax he had, under the provisions of s. 50A of the Income Tax Assessment Act, 1915–1921, appointed the defendant company agent of the plaintiff company and requiring deduction of the amount of 67*l.* 18*s.* from any payment which was or would become due to the plaintiff company from the defendant company. An examination of the enclosed assessment shows that the 67*l.* 18*s.* was arrived at by charging the plaintiff company with tax at 2*s.* 8*d.* in the £ on dividends received by it in the year ending June 30, 1921, from its holding of 5108*l.* consolidated ordinary stock of the Australian Pastoral Co., Ld., and from its holding of 3712 ordinary shares in the defendant company, after allowing a rebate of 8*d.* in the £ under a section of the Act referred to in the assessment. On the same February 10, 1923, the Deputy Federal Commissioner sent to the defendant company a notice in the following terms: "Take notice that whereas the London and South American Investment Trust, Ld., is a taxpayer under the Income Tax Assessment Act, 1915–1921, and whereas I am of opinion that it is difficult to collect the tax from him, and whereas it has come to my knowledge that you are making payment to the said The London and South American Investment Trust, Ld., I hereby, in pursuance of the powers vested in the Commissioner by s. 50A of the above-mentioned Act and delegated by him to me, declare you to be my agent (or the Commissioner's agent) and also to be the agent of the taxpayer, and require you to deduct from any payment which is or will become due to the said The London and South American Investment Trust, Ld., such an amount as will be sufficient to pay the tax as assessed and as set out on Notice of Assessment attached, and to pay the amount to me forthwith." There was then

set out the s. 50A, to which reference is made in the notice, and there was annexed a copy of the assessment which had been sent to the plaintiff company. As a result of the last mentioned notice the defendant company paid 67*l.* 18*s.* to the Deputy Federal Commissioner, and deducted that amount from the dividends payable to the plaintiffs on March 31, 1923.

The plaintiff company says that it is not assessable to Australian income tax at all, and that in so far as the Australian Act purports to authorize the assessment to tax of persons domiciled and resident in England in respect of dividends payable to them by English companies, even though those companies may be carrying on business in Australia, the legislation is ultra vires the Commonwealth of Australia Act of 1900, under which the Commonwealth was constituted.

The plaintiff company further says that whether the legislation is ultra vires or not, as between itself and the defendant company the contract which regulates their relations is an English contract, and the dividend payable to it by the defendant company is a debt recoverable and locally situate in England, and that it is no answer to the claim for the dividend that the defendant company has been compelled by Australian law to make certain payments to the Federal Government of Australia.

The defendant company on its part seeks to support the validity of the legislation, and further says that in the circumstances of the present case there was a debt locally situate in Australia owing from the company resident in Australia, and that it was within the powers of the Legis lature to tax that debt or impound it to satisfy the indebtedness of the plaintiff company to the Federal Government.

Before considering these questions I will refer to the material provisions of the relevant Acts. The Commonwealth of Australia Constitution Act, 1900, enacts as follows: "Sect. 5. This Act, and all laws made by the Parliament of the Commonwealth under the Constitution shall be binding on the Courts, judges and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State; and the laws of the Commonwealth

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shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth." The Schedule, Chap. I., Part V., of the Constitution, cl. 51, provides: "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth and with respect to " (inter alia) sub-cl. 2: "taxation; but so as not to discriminate between States or parts of States." Clause 55 enacts as follows: "Laws imposing taxation shall deal only with the imposition of taxation and any provision therein dealing with any other matter shall be of no effect. Laws imposing taxation, except laws imposing duties of custom or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only."

I think it may safely be said that the powers of taxation by the Act conferred upon the Commonwealth Legislature do not extend to authorize the imposition of taxation upon a person who is not resident or domiciled within the Commonwealth in respect of property which is not situate within the Commonwealth.

The provisions of the Income Tax Assessment Act, 1915–1918, of the Commonwealth, as amended by the Act of 1921, must next be considered. That Act (i.e., the Act, 1915–18) provides (inter alia) as follows: Sect. 3 contains definitions, and the first definition is the word "Absentee," and that is defined in this way: "'Absentee' means a person who does not reside in Australia, and includes a person who has been absent from Australia during more than half the financial year in which the income the subject of the assessment was derived, unless he satisfies the Commissioner that he resides in Australia." Then there are certain exceptions that I need not refer to. Then: "'Agent' includes every person who in Australia, for or on behalf of any person out of Australia (in this section called 'the principal') holds or has the control receipt or disposal of any money belonging to the principal, and every person

declared by the Commissioner to be an agent or the sole agent for any person for the purposes of this Act." Then: "'Assessable income' means the gross income which is not exempt from taxation." Then: "'Company' includes all bodies or associations corporate or unincorporate, but does not include partnerships." Then: "'Income from property' or 'income derived from property' means all income derived from sources in Australia and not derived from personal exertion. 'Income tax' means the income tax imposed as such by any Act as assessed under this Act." Then: "'Taxable income' means the amount of income remaining after all deductions allowed by this Act have been made. 'Taxpayer' means any person chargeable with income tax." Then s. 10 provides: "Subject to the provisions of this Act, income tax shall be levied and paid for each financial year upon the taxable income derived directly or indirectly by every taxpayer from sources within Australia during the period of twelve months ending on the thirtieth day of June preceding the financial year for which the tax is payable." Sect. 14 provides that: "The income of any person shall include" (inter alia) sub-cl. (*b*), "dividends, interest, profits, or bonus credited or paid to any depositor, member, shareholder, or debenture-holder of a company which derives income from a source in Australia or of a company which is a shareholder in a company which derives income from a source in Australia, but not including a reversionary bonus issued on a policy of life assurance." Sect. 16, sub-s. 1, provides: "For the purpose of ascertaining the taxable income of a company there shall be deducted from the total assessable income, in addition to any other deductions allowed by this Act, so much of the assessable income as is available for distribution and is distributed to the members or shareholders of the company." Then there is a special proviso with regard to insurance companies, and sub-s. 1A is: "In addition to any other income tax payable by it, a company shall also pay income tax on: (*a*) so much of the assessable income of the company as is distributed to the members, shareholders, or

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stockholders of the company who are absentees; and (*b*) the interest paid or credited by the company to any person, who is an absentee, on money raised by debentures of the company and used in Australia or on money lodged at interest in Australia with the company; and (*c*) so much of the assessable income of the company as is distributed in respect of debentures or share stock payable to bearer as if the total amount so distributed were the income of an individual: Provided that a company shall be entitled to deduct and retain for the use of the company from the amount payable to any of the persons referred to in paras. (*a*) and (*b*) of this sub-section such amount as is necessary to pay the tax which becomes due in respect of that amount." Then there is a proviso that "where a company pays tax under this sub-section on any dividend or interest, and the member, shareholder or person includes that dividend or interest in his return, the proportionate amount of tax paid by the company in respect of the dividend or interest shall be deducted from the total tax payable by the member, shareholder or person." Then sub-s. 1B is: "A company, notwithstanding any contract, agreement, or arrangement entered into by it, may, with the approval of the Commissioner, charge pro rata the amount of the tax actually paid by it against those beneficially interested in the income of the company." Then sub-s. 2A is: "Where a company has paid income tax on undistributed income and that income is in any year subsequent to that in which it was derived by the company distributed to the members or shareholders of the company, a member or shareholder who is a taxpayer shall be entitled to a rebate in his assessment of the lesser of the two following amounts: (*a*) the part of the tax so paid by the company which bears the same proportion to the total tax so paid by the company as the amount so distributed to the member or shareholder bears to the total amount so distributed to the members or shareholders of the company; or (*b*) the part of the tax payable by the member or shareholder in his individual assessment which bears the same proportion to the tax payable by him on his income from property as the amount so distributed

to him bears to his total income from property remaining after allowing all the deductions allowed by this Act from that income, except the deduction under section nineteen." Then s. 50A is in these terms: "Where the Commissioner is of opinion that it is difficult to ascertain the whereabouts of a taxpayer or to collect the tax from him, the Commissioner may by notice in writing (a copy of which shall be posted to the last known place of address of the taxpayer) declare any person, local authority, corporation, board, commission or body making payments or owing money to the taxpayer to be his agent and may require the agent—(*a*) to deduct from any payment which is or will become due to the taxpayer such an amount as will be sufficient to pay the tax which the Commissioner may assess to be paid by the taxpayer; and (*b*) to pay the amount to the Commissioner forthwith, and for any default in so doing the agent shall be liable, in addition to the tax, to a penalty not exceeding five pounds." Sect. 51 provides: "Every company which carries on business in Australia shall at all times be represented by a person residing in Australia duly appointed by the company or by its duly authorised agent or attorney," and then certain provisions with regard to that are enacted. Then s. 52 provides: "With respect to every agent and with respect also to every trustee, the following provisions shall apply: (*a*) He shall be answerable as taxpayer for the doing of all such things as are required to be done by virtue of this Act in respect of the income derived by him in his representative capacity or derived by the principal by virtue of his agency and the payment of income tax thereon."

The liability of the taxpayer generally under the Act seems, therefore, to be a liability to pay tax in each financial year upon taxable income derived directly or indirectly from sources within Australia during the financial year preceding the year of taxation, and the income is expressed to include dividends credited or paid to any shareholder of a company which derives income from a source in Australia or of a company which is a shareholder in a company which derives income from a source in Australia.

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In relation to companies, the general scheme of the Act seems in effect to be as follows: (1.) The company is taxed upon so much of its income as it does not distribute among its members; (2.) it also pays tax on what it distributes to its members who do not reside in Australia; and (3.) a company paying tax on what it distributes to any member who does not reside in Australia may deduct and retain for the use of the company from the amount payable to such member the tax due in respect of that amount. In addition there are the sections under which any person who owes money to a taxpayer can be required to pay what is due to the Government from the taxpayer for tax out of the money so owing. Under these provisions the Federal Deputy Commissioner has affected to assess the plaintiff company to tax for the financial year ending June 30, 1922, in respect of dividends received in the preceding financial year from (*a*) the Australian Pastoral Co., Ld., a company about which I have no evidence at all, and (*b*) the defendant company, and has further affected to require the defendant company to deduct the amount of this assessment from the subsequent dividends payable by the defendant company to the plaintiff company.

The plaintiff company is admittedly resident and domiciled in England. Its liability (if any) to be taxed by the Commonwealth must depend, therefore, upon its possession of taxable property within the Commonwealth. In the absence of evidence I will assume that it was taxable in respect of its dividends received from the Australian Pastoral Co., Ld. For the reasons which I will indicate in a moment I do not think that the plaintiff company is taxable in respect of dividends upon its shares in the defendant company.

The defendant company is an English company with a registered office in England and a register of shareholders in England, and it is upon the English register alone that the shares of the plaintiff company in the defendant company can be transferred. Where then are the shares situate? I think I am concluded by authority from saying that the shares are situate otherwhere than in England. In

Attorney-General v. *Higgins* (1) Martin B. says: "It is clear that the evidence of title to these shares is the register of shareholders, and that being in Scotland this property is located in Scotland." Again, in *Brassard* v. *Smith* (2), before the Judicial Committee of the Privy Council, a banking company had its head office, declared its dividend and held its general meeting at Montreal in the Province of Quebec, but had a local register at Halifax in the Province of Nova Scotia, and it was held upon the assumption that shares can have a local habitation that the local habitation of shares upon the Nova Scotian register was Nova Scotia. The shares then being situate in England, can it be said that the debt to which a declaration of dividend upon these shares gives rise is situate elsewhere than in the habitation of the shares? Is the tree in one close and the fruit in another? I think not. The contract between the plaintiff company and the defendant company is, it seems to me, an English contract to be construed according to English law. To decide otherwise would, I think, be to run counter to the conclusion reached in *Spiller* v. *Turner*. (3) In that case the company's head office was in London, but it carried on its business in Queensland and other parts of Australia; but this fact does not offer in my judgment any ground of distinction. The decision in the *Indian and General Investment Trust, Ld.* v. *Borax Consolidated, Ld.* (4), points the same way, and I cannot distinguish that case by reason of there being an express provision that English law should apply to the contract. If the debt arises under an English contract and is an English debt, I do not think (1.) that it is property in respect of which the Commonwealth Legislature has power to impose taxation upon the plaintiff company, or (2.) that it is property, the incidence of which can be altered by the Commonwealth Legislature.

In these circumstances has the defendant company any defence to the claim for 67*l.* 18*s.* on the ground that the Commonwealth Government has obtained from it that amount

(1) (1857) 2 H. & N. 339, 351.
(2) [1925] A. C. 371.
(3) [1897] 1 Ch. 911.
(4) [1920] 1 K. B. 539.

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in the circumstances which I have stated? The answer must be in the negative, even though the plaintiff company may be rightly taxable in respect of its dividends on its shares in the Australian Pastoral Co., Ld. When once the conclusion is reached that the declared dividend payable by the defendant company to the plaintiff company is an English debt arising out of an English contract, the defendant company cannot, in my opinion, justify any deduction from it based upon Commonwealth legislation or anything affected to have been done under such legislation.

The result is that the action succeeds, and there must be judgment against the defendant company for 67*l.* 18*s.* with costs.

Solicitors: *Hon. F. F. Macnaghten; Armitage, Chapple & Co.*

A. R. T.

C. A. 1926 *July* 6.

In re LANG PROPELLER, LIMITED.

[00358 of 1925.]

Company—Mortgage of Property and Assets—Winding Up—Interest paid to Mortgagee—Payment less Tax—Crown's Right as Creditor to Tax so deducted—Preferential or pari passu—"Assessed tax"—Whether "assessed" on Company—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *All Schedules Rules, rr.* 19, 21—*Companies (Consolidation) Act,* 1908 (8 *Edw.* 7, *c.* 69), *s.* 209, *sub-ss.* 1 (*a*), 2, 3 *and* 4.

A company, having mortgaged all its property and assets, subsequently passed a resolution for voluntary winding up. Between the date of the mortgage and the commencement of the winding up the company made no profits, but paid three yearly sums by way of interest on the mortgage less income tax. The company never paid or accounted for such deductions of tax to the Inland Revenue Commissioners. On an originating summons taken out to determine whether the Crown was entitled under s. 209, sub-s. 1, of the Companies (Consolidation) Act, 1908, to recover one of the sums so deducted for tax in priority to all other creditors or pari passu with other creditors who were preferential, Eve J. held that the Crown was not entitled to any such priority. On appeal:—

Held, that inasmuch as such deduction could not be said to answer the description of a tax "assessed" on the company within s. 209, sub-s. 1, of the Act of 1908, the Crown could not be treated as having

any preferential rights over other creditors in respect of it, and that there was nothing in the language of the sub-section which gave any priority to the debt.

Statement by Eve J. that "when the deduction has been made, or putting it another way, when the mortgagor has collected the tax from the mortgagee, the liability to account for the amount is shifted to the mortgagor and becomes a debt due from him to the Crown" doubted.

Decision of Eve J. [1926] Ch. 585 affirmed.

APPEAL from the decision of Eve J. (1)

Lang Propeller, Ld., was registered on October 1, 1913, under the Companies (Consolidation) Act, 1908, as a company, having for one of its objects the manufacture of propellers for aeroplanes. During the war it also manufactured aeroplane parts generally, but after the war was over it discontinued this kind of business and carried on other business within its memorandum of association, such as the manufacture of furniture and motor car bodies.

On December 10, 1920, the company by deed mortgaged its freehold works situate at Weybridge, Surrey, together with all the plant and machinery affixed thereto, to one Reuben Glikstein, to secure an advance of 30,000*l.* with interest thereon at 8 per cent. per annum, payable quarterly. As a result of the sale of some of the assets included in the mortgage the mortgage debt was reduced from 30,000*l.* to 28,000*l.* The company having failed to pay the interest due on September 10, 1925, the mortgagee in exercise of the powers given him by the mortgage deed entered into possession and sold the property for a sum which did not cover his principal, interest and costs.

On November 8, 1923, a resolution was passed for the voluntary winding up of the company. Between the date of the mortgage and the commencement of the winding up the company made no profits. It had, however, paid interest on the mortgage for the years 1921–22, 1922–23 and for part of the year 1923–24. When paying this interest to the mortgagee the company, pursuant to Income Tax Act, 1918, All Schedules Rules, r. 21, sub-r. 1, deducted thereout a sum representing the amount of the tax thereon under

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Sch. D, at the rate of tax in force at the time of the payment. Thus from 2400*l.* payable in the year 1921–22, when the rate was 6*s.* in the £, the company deducted 720*l.*, less a sum of 91*l.* 3*s.* 6*d.*, being tax assessed on the company under Schs. A and B, leaving a balance of 628*l.* 16*s.* 6*d.* This deduction was allowed the company on account of its carrying on its business at a loss.

In 1922–23, when the rate was 5*s.* in the £, 610*l.* 6*s.* 1*d.* was deducted, less 73*l.* 7*s.* 10*d.*, leaving a balance of 536*l.* 18*s.* 3*d.*, and in 1923–24, when only one quarter's interest was paid, 131*l.* 0*s.* 6*d.*, there being no assessments under Schs. A and B for that period. Every payment of interest by the company to the mortgagee was accompanied by a covering letter stating the amount of interest paid by cheque, less the tax at the rate for the time being in force.

The company never accounted to the Inland Revenue Commissioners for any of these several sums so deducted pursuant to sub-r. 2 of r. 21 of the All Schedules Rules of the Income Tax Act, 1918; and at the commencement of the winding up they remained debts due to the Crown. The liquidator informed the Inland Revenue authorities of the state of the company's affairs, and the question arose whether the Crown was a preferential creditor for the amount of the tax so deducted and not accounted for, within s. 209 of the Companies (Consolidation) Act, 1908. (1)

The claim put forward by the Inland Revenue authorities was at first in respect of the period 1921–22, for the sum of 628*l.* 16*s.* 6*d.*, and for which they claimed on behalf of the

(1) Companies (Consolidation) Act, 1908, s. 209:—

"(1.) In a winding up there shall be paid in priority to all other debts—(*a*) All parochial or other local rates due from the company at the date hereinafter mentioned, and having become due and payable within twelve months next before that date, and all assessed taxes, land tax, property or income tax assessed on the company up to the 5th day of April next before that date, and not exceeding in the whole one year's assessment. . . . .

"(2.) The foregoing debts shall—(*a*) Rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions. . . . .

"(3.) Subject to the retention of such sums as may be necessary for the costs and expenses of the winding

Crown to be preferential creditors. An originating summons was therefore taken out by the liquidator for the determination of this particular question. Later on, however, the Commissioners claimed priority for all the three several sums as preferential creditors, and an amended summons was accordingly taken out by the liquidator for the determination of the question: (*a*) Whether the Commissioners of Inland Revenue were entitled to be paid in priority to all other debts of the company, three several sums of 628*l.* 16*s.* 6*d.*, 536*l.* 18*s.* 3*d.* and 131*l.* 0*s.* 6*d.*, being sums deducted by the company pursuant to the Income Tax Act, 1918, from interest paid of such interest, or (*b*) Whether the Commissioners were entitled to be paid in priority to all other debts of the said company, other than debts comprised in s. 209 of the Companies (Consolidation) Act, 1908, the said sum of 628*l.* 16*s.* 6*d.*, being one of the sums deducted as aforesaid.

Eve J. held that inasmuch as the sums deducted could not be said to answer the description of a tax "assessed" on the company within s. 209 of the Companies (Consolidation) Act, 1908, the Crown could not be treated as having any preferential rights in respect of them over other creditors, and that there was nothing in the language of the section which gave the Crown any priority in respect of the debts in question.

The Commissioners of Inland Revenue appealed. The appeal was heard on July 6, 1926, and was confined to the second branch of the summons—namely, the claim in respect of the deduction of the 628*l.* 16*s.* 6*d.*

R. P. Hills (*Sir Douglas Hogg A.-G.* with him) for the appellants repeated the arguments used by them in the Court below with regard to this particular debt.

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up, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them. . . . .

"(5.) The date hereinbefore in this section referred to is—

(*a*) in the case of a company ordered to be wound up compulsorily which had not previously commenced to be wound up voluntarily, the date of the winding-up order; and

(*b*) in any other case, the date of the commencement of the winding up."

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Jenkins K.C. and *H. C. Bischoff* for the respondent liquidator were not called upon to argue.

LORD HANWORTH M.R. stated the facts and continued: The question we have to decide is whether or not the Crown is entitled, under s. 209, of the Companies (Consolidation) Act, 1908, in the winding up of the company, to be paid in priority to all other debts what is included under sub-s. 1 (*a*) of that section and which it is said embraces this sum which has been collected by the company for the Crown and withheld from payment over to the mortgagee. I will come to the actual words of the clause in a moment.

Ever since the Income Tax Act of 1853 it has been provided that deductions of duty shall be made on payment of interest. Sect. 40 of that Act provided that: "Every person who shall be liable to the payment of any rent, or any yearly interest of money, or any annuity or other annual payment, either as a charge on any property or as a personal debt or obligation by virtue of any contract, whether the same shall be received or payable half-yearly or at any shorter or more distant periods, shall be entitled and is hereby authorized on making such payment, to deduct and retain thereout the amount of the rate of duty which at the time when such payment becomes due shall be payable" under this Act; and further provided that the person to whom such payment was to be made should allow such deduction.

The provisions that were embodied in s. 40 are now to be found in the Income Tax Act, 1918. I need not go through the whole of the Act; the important part is to be found in the All Schedules Rules, rr. 19, 21, sub-rr. 1, 2, and r. 23. Those rules are as follows: Rule 19: "Where any yearly interest of money, annuity, or any other annual payment . . . . is payable wholly out of profits or gains brought into charge to tax, no assessment shall be made upon the person entitled to such interest, annuity, or annual payment, but the whole of those profits or gains shall be assessed and charged with tax on the person liable to the interest, annuity, or annual payment, without distinguishing

the same." That rule applies in certain cases, but it does not apply to the present case, because the sum that was paid to the mortgagee was not a sum which was payable out of profits or gains brought into charge, since unfortunately in this company there were no profits or gains brought into charge. Rule 21, therefore, applies: "(1.) Upon payment of any interest of money, annuity, or other annual payment charged with tax under Sch. D, or of any royalty or other sum paid in respect of the user of a patent, not payable, or not wholly payable out of profits or gains brought into charge, the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of the payment." Then under sub-r. 2, every such amount so deducted shall be a debt from the person deducting it, to the Crown, and shall be recoverable as such. Then by r. 23: "A person who refuses to allow a deduction of tax authorised by this Act to be made out of any payment, shall forfeit the sum of fifty pounds."

In the present case the payment to the mortgagee was made less tax. The mortgagee had to allow the deduction by virtue of r. 23, and as and when that deduction had been made the amount so deducted and to be deemed to be in the hands of the mortgagor was an amount which thus became a debt due from the mortgagor to the Crown, and was recoverable as such by virtue of r. 21, sub-r. 2.

It is said by the Crown that such a payment to be made for the purposes of collection out of moneys which ought to be paid over to the person entitled to the annual payment, is to be treated as coming within s. 209, sub-s. 1 (*a*), of the Companies (Consolidation) Act, 1908, and that in the winding up the Crown is entitled to priority in respect of that claim over other debts of the company. The words of sub-s. 1 (*a*) are: "All assessed taxes, land tax, property or income tax assessed on the company up to the fifth day of April next before that date," i.e., the date of the winding up, are to be debts which have priority. This sum that was paid by the company to its mortgagee was a

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sum which in whole was due to the mortgagee. By virtue of what I will call comprehensively the system established by s. 40 of the Act of 1853, it became the duty of the company, if and when it made that payment of interest, to deduct the sum which was due to the Crown, and when it made such a deduction that sum, which was to be deemed to be in its hands, became a debt due from the mortgagor to the Crown. But the reason why the mortgagor was entitled to deduct it, or was authorized to deduct it, is because it became the duty of the mortgagor to be, so to speak, a collector of an aliquot portion of the sum due to the mortgagee for and on behalf of the Crown, and in respect of such sum, as and when the mortgagor stopped it out of payment made to the mortgagee, the mortgagor became liable to the Crown as in respect of a debt due from him to the Crown. There was no original assessment upon the company in respect of this sum. No part of the procedure to procure an assessment was followed; there was no period at which the assessment became operative; but what was done was merely that as and when an annual payment or other payment arising upon a contract had to be made by the debtor to the creditor, and as and when that payment was made, the procedure now laid down by r. 21 was followed.

It does not appear to me possible to treat such a sum detained out of the payment made by the debtor as a sum assessed upon a debtor or assessed upon the debtor up to April 5 "next before that date," i.e., the date of the commencement of the winding up. The whole scheme of payment by way of deduction is a different one from that under which a direct liability is assessed upon a person who is chargeable with the tax.

In my opinion, therefore, the decision of Eve J. was right, and there was no priority which the Crown can claim in respect of this debt under s. 209.

I am doubtful, as I think Scrutton L.J. in the course of the argument expressed himself to be doubtful, whether the statement by Eve J. in his judgment that "When the deduction has been made, or putting it in another way, when

the mortgagor has collected the tax from the mortgagee, the liability to account for the amount is shifted to the mortgagor and becomes a debt due from him to the Crown," is correct. I have my doubts whether that is a true statement of the position. It seems clear that when there has been a deduction from a payment due to be made by a debtor to a creditor, in respect of such deduction so made the debtor is to be deemed liable as in respect of a debt due from him to the Crown, and the debt is recoverable as such. But the question whether the liability is shifted, so that the mortgagee or creditor has no liability in respect of it, is one on which I should not like to express an opinion at the present time. However, I am satisfied that the responsibility of a collector of income tax cannot be brought within s. 209, sub-s. 1 (*a*), and therefore I agree with the judgment of Eve J. The appeal will be dismissed, and there will be no order as to costs, as those have been dealt with by agreement between the parties.

SCRUTTON L.J. I agree.

ROMER J. I agree.

Appeal dismissed.

Solicitor for appellants: *Solicitor of Inland Revenue.*

Solicitors for respondents: *Julius, Edwards & Julius.*

W. I. C.

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W. HIGGINS, LIMITED *v.* MAYOR, ALDERMEN, AND BURGESSES OF NORTHAMPTON.

[1924. W. 2745.]

Local Government—Urban Authority—Contract under Seal—Mistake—Rectification—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 174, *sub-s.* 1.

A builder entered into a contract with an urban authority for the erection of a number of houses. The contract was sealed by the corporation in accordance with s. 174, sub-s. 1, of the Public Health Act, 1875. The builder assigned the benefit of the contract to a building firm and that firm sought rectification of the contract on the ground that at the time at which the builder entered into the contract he was labouring under a serious mistake:—

Held, that the contract expressed the intention of the defendant council, that having regard to the provisions of s. 174, sub-s. 1, of the Public Health Act, 1875, there was no contract at all between the parties until the seal of the council was affixed to the formal contract, and that the Court had no jurisdiction to grant the relief sought.

Semble, that, even if the parties had been labouring under a common mistake, the contract could not have been rectified.

Dictum of Younger J. in *Faraday* v. *Tamworth Union* (1916) 86 L. J. (Ch.) 436 considered.

ACTION.

The following statement of facts is taken from his Lordship's judgment:—

This is an action brought by a company called W. Higgins, Ld., against the county borough of Northampton claiming to have a certain contract rectified so as to give effect to what is alleged to have been the common intention of the parties when the contract was drawn up. Having heard the evidence it is to my mind abundantly clear that in entering into the contract in its present form, Mr. Higgins, who was the person who entered into the contract which was subsequently assigned to the plaintiffs, was labouring under a serious mistake, and that to hold the plaintiffs bound by that mistake would be to inflict a very serious hardship upon them. I should not think that anybody who had heard the evidence would for one moment dispute that. In these circumstances I had hoped that the corporation would have seen their

way to make some concession to the plaintiffs. However, they did not see their way to do that, and they have insisted upon their strict legal rights. They say that the plaintiffs are not entitled to have this contract rectified, first of all because, even if Mr. Higgins was labouring under a mistake he was under no mistake as to what he contracted to do, and, secondly, that, even if there were a mistake, common to both parties, in drawing up the contract, the defendants can only contract under seal, and that there is no jurisdiction in the Court to rectify a contract entered into by them under seal for the purpose of giving effect to—that is to say, to make the written contract agree with—a parol contract entered into antecedently, such parol contract being, as they allege, wholly void and of no effect. Those are the points with which I have to deal.

Now the subject-matter of the contract consisted of fifty-eight houses which were to be erected in the district of the defendant corporation—workmen's dwellings, as I understand. In order to get those dwellings built as cheaply as possible the defendants determined to put the contracts out for competitive tender by builders and contractors, and accordingly they issued an advertisement stating that the Housing and Town Planning Committee of the borough invited tenders for the construction of these houses, and stated in that advertisement that plans and details were to be seen at the office of the borough engineer, and that bills of quantities and forms of tender and specifications could be obtained on application. That advertisement was brought to the attention of Mr. Higgins, and he, on December 16, 1920, which was shortly after the advertisement which was inserted in the papers on December 11, 1920, wrote enclosing a cheque, as by the advertisement he was required to do, and stated that he would be glad to have a copy of bills of quantities and forms of tender, etc. In due course, a day or two after the letter of December 16, Mr. Higgins was supplied with a form of tender, bills of quantities, form of contract, and so forth. Mr. Higgins thereupon went into the matter very carefully. People making tenders were required to

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fill up the bill of quantities. In the bill of quantities every item of work to be done in connection with the construction of the houses was described, and the quantity, usually expressed in yards and feet, of the work coming under each item was specified. Then there was a column left in which the tenderer was to insert the price per yard or per foot at which he was prepared to do that particular work, and the last column was a column in which was the total amount for which the contractor would perform the work in question —that is to say, the work under that particular heading.

To give an example, amongst the work to be done under the heading of "Concretor (Waller)" there is this item specified: 321 yards eight-inch concrete wall, and then particulars, and so on, are given. On the next page we find this: 50 yards concrete blocks of ballast in chimney breast and stacks. So that taking those two items as examples the person making the tender would insert a price at which he was prepared to build the walls per yard, and he would insert a price at which he was prepared to build the chimneys per yard, and then in the last column there would be the sum that would be payable to the contractor if he did that particular work in question at that particular price. That is to say, if he did the 321 yards of walls at 22*s*. 6*d*. per yard he would be entitled to be paid 321 times 22*s*. 6*d*. in respect of that item; and accordingly the sum of 361*l*. 2*s*. 6*d*. was carried into the last column. So in the case of the chimneys; if he was prepared to do the chimneys, 50 yards of chimneys at 42*s*. 6*d*. per yard, then in the last column would appear the figure of 106*l*. 5*s*. The figures in the last column having been so ascertained, were all added up, page by page, and at the end of the bill of quantities there is a summary, and the total of the figures in the last column I have referred to are all brought into this summary, added up, and then either with some addition or with some subtraction which the tenderer shall think fit, the price at which he is willing to tender is arrived at. As a matter of fact, there were 58 houses, that is to say, 29 pairs, and this bill of quantities stated the amount of work to be done in each

pair of houses. So that what is stated in the summary would be the amount at which the tenderer was willing to erect each pair of houses. Mr. Higgins, as I say, went carefully into the whole question, including the figures to be inserted in the bill of quantities, and he was prepared to do the wall work, the 321 yards of concrete wall, at 22*s.* 6*d.* a yard. He was willing to do the 50 yards of chimney work at 42*s.* 6*d.* a yard. He filled in those sums in the appropriate columns, and the totals to which those particular items would come at the price fixed per yard. He filled up all the other items in a similar way, carried his totals into the summary, and the totals so carried into the summary amounted to 1728*l.* 5*s.* 9*d.* Before he sent in his tender, however, he, in common with other tenderers, received a letter from the borough engineer which is dated January 6. That letter says this: "Dear Sirs,—Concrete Houses, Harlestone Road Site. Addenda—With reference to the fourth item from top of page 3"—that is the item to which I have already referred, the 50 yards of chimney work—"please *delete* the following:—50 yards"—and then he sets out the description of that item in the bill of quantities, and then he says, "and Add," and he sets out the same words as were already there but with the addition "Extra only on," so that, as altered, it would run, "50 yards sup. Extra only on Concrete blocks." That is a somewhat cryptic announcement, but to a builder it is perfectly plain, and its meaning was clear to Mr. Higgins. It meant, in effect, this: that the 50 yards had been included in the 321 yards of wall work, so that what the tenderer was required to do in addition to the 321 yards of wall work was merely to make additions to 50 yards of it of such a nature that they would serve as a chimney breast. What the tenderer was really invited by this letter to do was to set out opposite 321 yards of wall work the price per yard at which he was willing to do that work, including the chimneys, so far as the chimneys consisted of wall work, and under the heading of 50 yards of chimneys to set out the extra sum per yard he would require to be paid by reason of the 50 yards being chimney breasts. Having received that letter, of course what Mr. Higgins

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ought to have done was this: He ought to have calculated how much extra it would cost him while he was building 321 yards of wall so to construct 50 yards of it that it would be available for chimney breasts. Then he ought, having arrived at the sum per yard which he thought it would cost him extra, to have inserted that sum in the column opposite 50 yards of chimney breast. As I say, he had inserted 42*s.* 6*d.* per yard for the construction of the chimneys, and he was willing to do the wall work at 22*s.* 6*d.* Therefore, it appeared from those figures that he really had estimated the extra work to be done by reason of the 50 yards being chimney breasts at 20*s.* per yard; but instead of inserting there 20*s.* per yard, which would have had the effect of reducing the total in the summary by 56*l.* 5*s.*, he left the tender as he had already filled it up, and deducted 56*l.* 5*s.* from the total shown on the summary. In point of fact, he did not content himself even then with only deducting the 56*l.* 5*s.*, but he deducted 58*l.* 5*s.* 9*d.* It was an unfortunate thing to do, because, of course, anybody not knowing all the facts and seeing 58*l.* 5*s.* 9*d.* deducted from 1728*l.* 5*s.* 9*d.*, and leaving a balance of 1670*l.*, would have thought that the tenderer had deducted that sum for the purpose of making his tender a round sum. That is to say that he had first of all arrived by a detailed calculation at what he thought he would charge for each item, and then had made the total a round sum by taking 58*l.* 5*s.* 9*d.* off. I am convinced after having heard his evidence, which is consistent with the whole of his actions in the matter, that he intended, when he took off that 58*l.* 5*s.* 9*d.*, to take it off so as to set right the charge which he had made in respect of the 50 yards of chimneys. He had in his bill of quantities, as I say, set out opposite 50 yards of chimneys 42*s.* 6*d.*, and it was for the purpose of reducing that by 22*s.* 6*d.* a yard that he made this deduction of 58*l.* odd.

Now he sends that in to the defendants. That is to say, he sent in a tender in which he expressed his willingness to do the work at 1670*l.* for each pair of houses, and that tender was, of course, accompanied by a bill of quantities which he

had filled up in the way that I have mentioned. In due course he received a letter from the defendants stating that his tender of 1670*l.* had been accepted. It is said that so far the parties were agreed upon this: that, assuming that there were no additions to or omissions from the work described in the plans and specifications, the plaintiffs should be paid 1670*l.* for each of the twenty-nine pairs of houses. That would no doubt be so, but for the fact that according to the practice which prevails in those matters, the important figure really is, not the total amount at which the contractor tenders, but the figures which he has inserted, that is to say, the prices per yard or foot, as the case may be, in the bill of quantities. For instance, supposing when he came to build the houses, that it turned out that instead of 321 yards of wall, only 300 were in fact required, so that in fact only 300 were built, he would only be credited with 300 yards at 22*s.* 6*d.*, so that one cannot say that the intention of the parties at this time, or at any rate the intention of the defendants at this time, necessarily was to pay him 1670*l.* for each pair of houses, even assuming the houses were built according to the plans and specifications. Their intention was to pay him a sum calculated at the rates for each item of work specified in the bill of quantities according to the amount of work which was done. In due course the contract was drawn up, and is under the seal of the defendants. Neither the bill of quantities sent by the plaintiff to the defendants for this tender, nor the bill of quantities which forms part of this contract, were altered in the way suggested in the letter of January 6. What the plaintiff's intention was I have already indicated. His intention remained the same throughout. He knew, of course, that the bill of quantities had not been altered, but he thought that the matter could always be set right by reference to the letter of January 6. Now how would it strike the defendants? It would strike them, I should have thought, in this way: They would see that he was willing to do the wall work at 22*s.* 6*d.* per yard, and the chimney work at 42*s.* 6*d.* per yard. It was not described in the bill of quantities as extra, and the price

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42*s.* 6*d.* would at once indicate to any one who knew anything about it that it could not be intended to be an extra charge, and it must have been an all-in charge. They said it justified them in thinking he was willing to do the chimney work at 42*s.* 6*d.* and the wall work, excluding the chimney breasts, at 22*s.* 6*d.* all in, and that he was willing to have deducted from the total charge for the houses, when the total charge was ascertained by measuring up in reference to the prices contained in the bill of quantities, a sum which would bear the same proportion to the sum so ascertained by measuring up that 58*l.* 5*s.* 9*d.* would bear to the first total shown in the bill of quantities of 1728*l.* 5*s.* 9*d.* The defendants say that that is the true construction of the contract, and indeed it is. What they have done is to credit the plaintiff with 271 yards of wall work at 22*s.* 6*d.* per yard and with 50 yards of chimney work at 42*s.* 6*d.* a yard. Then, having so credited him with those sums and all the other sums which he was entitled to be credited with under the contract, they have deducted a sum which bears the same proportion to the total as the 58*l.* 5*s.* 9*d.* does to the 1728*l.* 5*s.* 9*d.* Of course, the effect of it is this: The sum which the plaintiff was willing to deduct by reason of the fact that 50 yards of chimney work was to be treated as extra and included in the 321 yards of wall has been deducted twice over.

Manning K.C. and *Heckscher* for the plaintiff company. The case is one of mutual mistake. The actual mistake of the council consisted in their omission to insert three words in the contract. The mistake, throughout, was that the builder thought that he was sending in a tender for the building of houses at 1670*l.* for each pair and that, if the measurements turned out to be as he thought they would be, he would receive 1670*l.* for each pair of houses. The real tender price was 1613*l.* 15*s.* for each pair. It is a clear case of mutual mistake, and the only alternative would be to say that there was a mistake on the part of the builder which was induced by the other party.

Sir Thomas Hughes K.C. and *J. V. Nesbitt* for the defendant

council. The corporation can only act under a sealed contract. The only contract in existence is the contract under seal. Nothing must be looked at except the sealed contract, otherwise endless difficulties will arise. This is no case for rectification: see *Faraday* v. *Tamworth Union*. (1) In Hudson on Building Contracts, 5th ed., at p. 142, there is a note referring to *McCartney* v. *Brighton Corporation* (2)—a case in which Grantham J. held that he had power to rectify a contract of this nature. His view is, however, contrary to the decision in *Young & Co.* v. *Leamington Corporation*. (3) In that case the affixing of the seal was held to be absolutely essential. That is also the effect of *Nixon* v. *Erith Urban Council*. (4) The result of those decisions shows that there was no contract other than the sealed contract. The real intention of the parties was to enter into the contract in the form in which it stands.

Manning K.C. in reply. The authorities, when carefully looked at, do not touch the possibility of reforming a contract under seal. The only material case is *Faraday* v. *Tamworth Union*. (1) It would be a serious matter if the power of the Court with regard to rectification were to be limited in the manner desired by the defendants.

[He also referred to *Hunt* v. *Acton Urban Council*. (5)]

ROMER J. [after stating the facts as above set out, continued:] The result is very unfortunate for the plaintiff and an extreme hardship on him. But can I rectify the contract so as to make it give effect to what was undoubtedly his intention when he entered into the contract? It appears to me that I cannot. For, in the first place, it follows from what I have said that in my opinion the parties were not labouring under a mutual mistake. I think the contract expresses what the defendants intended it to express. At any rate, it has not been shown to me that the defendants were labouring under any mistake, and of course the onus

(1) 86 L. J. (Ch.) 436.
(2) (1904) Times, May 20.
(3) (1883) 8 App. Cas. 517, 527, 528.
(4) [1924] 1 K. B. 819.
(5) (1908) 72 J. P. 345.

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is upon the plaintiff to prove that fact, if fact it were. Secondly, even if the parties were labouring under a common mistake, I think that Sir Thomas Hughes is justified in saying that under these circumstances I cannot rectify the contract because, having regard to s. 174 of the Public Health Act and certain authorities which have been cited to me which bear upon that section, the defendant council were incapable of entering into a contract with Mr. Higgins other than a contract under seal; so that when he made his tender and the tender was accepted there was no contract come to between the parties as, but for that section, there would have been. There was no contract between these parties at all until the seal of the council was put to the formal contract which was entered into. That being so, I must hold that that contract, and that contract alone, expressed the intention of the defendants at the time that the defendants' seal was attached. If there had been an earlier parol contract between the parties, and then an attempt had been made to put that parol contract into writing, and in the course of that attempt a blunder had been made so that the written contract did not correctly represent what had been verbally agreed, there is no doubt I could have rectified the written document. But where, as here, there is no precedent contract between the parties, I cannot see that I have any jurisdiction to make a different contract between the parties from the only one which exists, merely because I come to the conclusion that both parties previously to making that contract had intended to make a different one. There is a passage in a judgment of Younger J.'s which was cited to me which supports the view that I have expressed. It is only a dictum, because in that particular case he was able to set aside a contract entered into under a mistake of one party, inasmuch as the mistake had been contributed to or induced by, although innocently, the acts of the defendants; but he did say in the course of his judgment that, had there been a mutual mistake, he did not see how he could have rectified the contract. It is the case of *Faraday* v. *Tamworth Union*. (1) He said this:

(1) 86 L. J. (Ch.) 436, 438.

"The plaintiff asks for rectification. Now it appears to me, even if there had been mutual mistake on the part of himself and the defendants, that the difficulties in the way of rectification are, in a case like the present, very great, if not insuperable. Admittedly such an agreement as this is only binding on a union like the defendants, if it be under their seal. But the defendants have attached their seal to no agreement in a form other than that which they have executed; and to rectify that agreement as executed and then make it binding upon them in terms other than those which they have sealed, would appear to me, as at present advised, to have the effect of binding them to an agreement which requires a seal for its validity, but which they have never sealed." I was, on the other hand, referred to the shorthand notes of a judgment of Grantham J., from which it would appear that in a case where the jury had come to the conclusion that both parties were labouring under a common mistake at the time when they entered into a particular written contract, which was the only contract between them, that learned judge considered that he could rectify the written contract so as to make it accord with or carry out the intentions which the jury had attributed to the parties. I do not know precisely what the facts of that case were nor, indeed, am I quite sure upon what ground the learned judge based his decision, that in that particular case he could rectify. I must, however, say for myself that I prefer the statement of the law, so far as it is to be regarded as a statement of the law, expressed by Younger J. in the case I have just cited. I need hardly say that in so deciding I do not in the least wish to revive the old suggestion made some years ago that one could never rectify a written contract for the sale of lands so as to conform with a previous parol contract. It is now, I think, settled that in such a case the Court can rectify the written contract, and there is nothing in the Statute of Frauds to prevent it from being done. My difficulty here is not that we have a parol contract between the parties which could not be enforced. The difficulty is that there was no parol contract at all, no contract of any kind at

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all between the parties until the contract under seal was executed.

In these circumstances, with the utmost regret, I come to the conclusion that I cannot give the plaintiff the relief that he desires, and unless, even at the eleventh hour, the defendants can make some concession to the plaintiff, I am afraid that the ratepayers will have benefited by the bona fide and serious mistake made on the part of the plaintiff, which was really brought about by the carelessness of some official of the defendant corporation in drawing up the original bill of quantities. If he had made it clear in that bill of quantities, as he ought to have done, that the 50 yards of chimneys were already included in the 321 yards of wall, Mr. Higgins would never have made the mistake that has resulted in this action.

Solicitors: *James, Mellor & Coleman, for Phipps & Troup, Northampton; Warwick Williams & Marchant, for Herbert Hankinson, Northampton.*

J. L. D.

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In re EARL OF CARNARVON'S CHESTERFIELD SETTLED ESTATES.

[1926. C. 927.]

In re EARL OF CARNARVON'S HIGHCLERE SETTLED ESTATES.

[1926. C. 929.]

Settled Land—Compound Settlement—Tenant for Life—Agreement by Tenant for Life to sell to a company subject to a Jointure—Whether Agreement included in compound Settlement—Sale of land by owner in fee simple subject to existing jointure—Effect of Settled Land Act, 1925—*Meaning of "person of full age"—Whether applicable to a corporation—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-ss.* 1, 5; *s.* 50; *s.* 58, *sub-s.* 1 (*v.*); *Settled Land Act*, 1925 (15 *Geo.* 5, *c.* 18), *s.* 1, *sub-s.* 1; *s.* 19, *sub-ss.* 1, 4; *s.* 20, *sub-s.* 1 (*v.*) (*ix.*); *s.* 93; *s.* 104, *sub-s.* 1; *Sch. II., para.* 1 (2.).

Practice—Summons—Title of Matter—R. S. C., Order LV., *r.* 14A (3.).

A tenant for life of settled estates which were subject to a jointure rentcharge assigned his life estate to a company. A summons was

taken out for the determination of the question who was the tenant for life for the purpose of the execution of the vesting deed required by the provisions of the Settled Land Act, 1925:—

Held, that the words "of full age," as used throughout the Settled Land Act, 1925, and the Law of Property Act, 1925, must be treated as meaning no more than "not being an infant," and that they were applicable to a corporation; but that the document by which the tenant for life contracted to sell his interest to the company was not one of the documents which constituted the compound settlement and that the tenant for life was, notwithstanding the assignment to the company, the tenant for life for the purpose of the execution of the vesting deed.

A tenant in tail of settled estates, which were subject to a jointure rentcharge, executed a disentailing deed in respect of those estates. He subsequently contracted to sell the fee simple of those estates to a company, subject to the rentcharge.

Held, that the property was settled land by virtue, and by virtue only, of s. 1, sub-s. 1 (v.), of the Act of 1925, and that by virtue of s. 20, sub-s. 1 (ix.), the company had the powers of a tenant for life, and was therefore the tenant for life for the purpose of the execution of the vesting deed.

By Order LV., r. 14A (3.), it is provided: "Every such summons shall be intituled in the matter of the Act or Acts under which the application is made, and in the matter of the will, settlement, trust, or property, as the case may be, to which the summons relates. . . . ."

Semble, that it could not have been intended to alter the invariable practice of setting out the title of the material statute or statutes beneath the statement of the subject-matter of the application.

ADJOURNED SUMMONSES.

These two summonses were issued under s. 93 of the Settled Land Act, 1925, for the purpose of ascertaining who were the tenants for life of the respective estates, with a view to the execution of the vesting deeds required by that statute.

1. The Chesterfield Estates.—By a settlement dated August 6, 1874, these estates were settled to the use of the fifth Earl of Carnarvon during his life with remainder to the use of his first and other sons severally and successively according to their respective seniorities in tail male with power by deed to appoint to any woman whom he might marry for her life any yearly rentcharge not exceeding the yearly sum of 1000*l*. The trustees of the settlement were thereby given a power of sale in respect of the premises. By a marriage settlement dated June 25 1895, made upon the

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marriage of the fifth Earl, the fifth Earl, in exercise of the above mentioned power of appointment, appointed to the use of his wife the yearly rentcharge of 1000*l.* for her jointure to be charged upon the Chesterfield Estates. On November 8, 1919, the fifth Earl and his son (who subsequently became the sixth Earl) executed a disentailing deed and executed on the following day a deed of resettlement, under which these estates were appointed, subject to the jointure rentcharge, to the use of the fifth Earl for life, with remainder to the use of his son (who subsequently became the sixth Earl) during his life, with remainder to the use of his first and other sons successively in tail male, with remainders over. The fifth Earl died in 1923. By an agreement dated August 10, 1925, and made between the sixth Earl and the Carnarvon Estates Co., the sixth Earl agreed with the company for the sale to the company of his estate for life in the Chesterfield Estates, subject to the jointure rentcharge of 1000*l.*

2. The Highclere Estates.—By the above mentioned marriage settlement these estates were settled upon the fifth Earl as tenant for life with remainder to the use that his wife if she should survive him should receive out of the premises during the residue of her life the yearly rentcharge of 2000*l.*, and subject thereto to the use of the first and other sons of the marriage successively in tail male. On May 5, 1923, the sixth Earl executed a disentailing deed in respect of these estates. By the above mentioned agreement dated August 10, 1925, the sixth Earl agreed to sell to the company his estate in fee simple in these estates, subject to the jointure rentcharge of 2000*l.*

1. The Chesterfield Estates.

W. G. Hart for the applicant (the sixth Earl). The sixth Earl, as opposed to the company, is the tenant for life: see Sch. II., para. 1 (2.), and ss. 19, sub-ss. 1, 4, 24 and 104. Notwithstanding that the beneficial interest has passed to the company it is the Earl in whom the powers conferred by the Act are still vested. The company is not a "person of full age" within the meaning of that expression as used

in the Settled Land Act, 1925. To be a "person of full age" a person must have had a period of minority. Throughout the statute the phrase is used in contradistinction to infancy. A company has no period of minority: *Salomon* v. *Salomon & Co.* (1)

C. P. Sanger for the trustees of the settlement of August 6, 1874, and of the resettlement of November 9, 1919.

F. D. Morton for the company. The Court is dealing with a compound settlement which includes the contract of sale to the company. The company is the only person capable of coming within the definition: see s. 19, sub-s. 1. The present Earl is not at present entitled under the settlement which is being considered. He holds in trust for the company. It is necessary to ascertain who was the tenant for life at the point of time when the Act came into force. The series of documents forming the compound settlement is the series which was in existence when the Act took effect. At that date the company was entitled beneficially for the life of another and was the tenant for life. The point is governed by s. 20, sub-s. 1 (v.). It is inconceivable that the expression "of full age" in s. 20 was intended to make it impossible for a corporation to be a tenant for life. The expression "of full age" here means "not being an infant." A company attains maturity on its birth and never has any period of minority: see *Salomon* v. *Salomon & Co.* (1) If the contract for sale to the company is included in the compound settlement the company is the tenant for life.

2. The Highclere Estates.

W. G. Hart for the applicants (the trustees of the marriage settlement of the fifth Earl).

C. P. Sanger for the fifth Earl. The fifth Earl is the tenant for life by virtue of the subsistence of the jointure rentcharge: *In re Mundy and Roper's Contract* (2); *In re Lord Wimborne and Browne's Contract* (3); *In re Phillimore's Estate* (4); *In re Marshall's Settlement* (5); *In re Trafford's Settled*

(1) [1897] A. C. 22, 51.
(2) [1899] 1 Ch. 275.
(3) [1904] 1 Ch. 537.
(4) [1904] 2 Ch. 460, 463.
(5) [1905] 2 Ch. 325, 328.

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Estates (1); *In re Monckton's Settlement.* (2) The real problem is whether the land was settled land on December 31, 1925. If, on the authorities, the land is settled land the person entitled to the income during his life becomes the tenant for life, and the position cannot be affected by an assignment of the interest of the tenant for life.

F. D. Morton for the company. If the company is not the tenant for life it is very difficult to understand who was intended by the Act to be the tenant for life. Lord Carnarvon was a trustee for the company, and the company was the tenant for life under s. 20, sub-s. 1 (ix.).

W. G. Hart in reply.

ROMER J. These two summonses, which have been argued together, raise questions under the Settled Land Act of 1925, and I have to determine in respect of each of two distinct settlements who is the tenant for life of that settlement.

The first settlement is a settlement of the Chesterfield Estates. Those estates were settled originally by a deed dated August 6, 1874, under which the estates were limited to the fifth Earl of Carnarvon for life, with remainder to his first and other sons successively in tail male. By a settlement dated June 25, 1895, and made on the occasion of his marriage, the fifth Earl, in exercise of a power in that behalf contained in the 1874 settlement, limited a jointure rentcharge to his wife. On November 8, 1919, his eldest son, Lord Porchester, having attained the age of twenty-one years, the Chesterfield Estates were disentailed by Lord Porchester with the consent of the fifth Earl as protector, and were resettled. The effect of the resettlement, dated November 9, 1919, was that, subject to the jointure rentcharge appointed under the deed of 1895, the Chesterfield Estates were limited to the fifth Earl for life—whether or not that was in restoration of his earlier life estate or not does not matter—with remainder to the sixth Earl for life (that was Lord Porchester, who had disentailed) and then to the first and other sons of the sixth Earl successively in tail male.

(1) [1915] 1 Ch. 9, 21. (2) [1917] 1 Ch. 224.

The fifth Earl died on April 5, 1923. On August 10, 1925, the sixth Earl, being at that time the tenant for life of the Chesterfield Estates, contracted to sell his life interest to a limited company, a corporation; and so matters remained until, on January 1, 1926, the new Settled Land Act of 1925 came into force. Having regard to that Act it has become desirable that a vesting deed should be executed vesting the legal estate in the Chesterfield Estates in fee in the tenant for life.

The question to be determined is whether in the circumstances the sixth Earl of Carnarvon or the corporation to whom he has agreed to sell his life interest is the tenant for life? Now the determination of that question depends upon just a few sections of the Act of 1925. Sect. 1, sub-s. 1, states what constitutes a settlement, and there can be no question but that the Chesterfield Estates are subject to a settlement which at any rate consists of the original settlement of 1874, the settlement of June, 1895, the disentailing deed of November 8, 1919, and the resettlement of November 9, 1919. There can be no question but that those documents create a settlement within the meaning of s. 1, sub-s. 1. Turning now to s. 19 I find that it says: "The person of full age who is for the time being beneficially entitled under a settlement to possession of settled land for his life is for the purposes of this Act the tenant for life of that land and the tenant for life under that settlement." If then the compound settlement consists merely of the documents that I have mentioned there can be no question but that the sixth Earl is the tenant for life of the settled estates. It is said, however, that the compound settlement does not consist merely of the documents that I have mentioned but of those documents with the addition of the document under which the sixth Earl parted in equity with his life estate in favour of the corporation, and that it is the company who under the settlement is beneficially entitled to possession of the settled land, not indeed for its own life but for the life of the sixth Earl and that, that being so, and having regard to s. 20, sub-s. 1 (v.), the company has the powers

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of a tenant for life as being tenants for the life of another, that is to say, of the sixth Earl, and that, having the powers of a tenant for life, it is for the purposes of this Act to be treated as being the tenant for life. That is by virtue of s. 20, sub-s. 2, which provides: "In every such case as is mentioned in sub-s. 1 of this section, the provisions of this Act referring to a tenant for life, either as conferring powers on him or otherwise, shall extend to each of the persons aforesaid." If that be so, it is said that the vesting deed to be executed in pursuance of para. 1 (2.) of the Second Schedule to the Act must be made in favour of the company, inasmuch as by the vesting deed the legal estate has to be vested in the tenant for life or statutory owner. One of the objections made by the Earl to that contention on behalf of the company is this. He says that both s. 19, sub-s. 1, and s. 20, sub-s. 1, apply in terms to persons of full age only and, that notwithstanding the Interpretation Act I am not entitled to treat those provisions as relating to a corporation, because the words "person of full age" necessarily refer to an entity that is capable of being a minor or having a minority, and a corporation is from the moment it comes into existence of full capacity and can have no minority. If that argument be well founded there are many important provisions not only in this Act but in the Law of Property Act, which came into force at the same time, which will be wholly inapplicable where interests in land are vested in corporations: see for instance s. 19, sub-s. 5, and s. 1, sub-s. 2, of Part IV. of the latter Act. But in my opinion the argument is unsound. The words "of full age" are not, so far as I know, technical words or words of art at all. I think it is obvious that throughout this Act, as indeed throughout the Law of Property Act, the words "of full age" are used in relation to a person in contrast with the word "infant," and that I ought to treat the words "of full age" as meaning no more than this, "not being an infant." That being so, inasmuch as the corporation in question is certainly not an infant, there is no reason why the corporation should not be a tenant for life under s. 19 or s. 20, assuming that it satisfies the other

requisites of a tenant for life or of a person having the powers of a tenant for life.

Now the claim on behalf of the company to be the tenant for life is founded solely upon the contention that the agreement to sell the life interest of the sixth Earl to the company is one of the documents constituting the settlement. I have to see whether that be so or not. This question does not turn solely upon the provisions of the new Act; it seems to me that it turns also upon the provisions of the Settled Land Act, 1882, because if the contention of the company is sound then the company became tenant for life under the settlement as from August 10, 1925, the provisions that I have read of s. 1 and ss. 19 and 20 of the new Act being substantially re-enactments of s. 2, sub-s. 1; s. 2, sub-s. 5; and s. 58 of the Act of 1882. Now in my opinion the document by which the sixth Earl contracted to sell his life interest to the company is not one of the documents that create or constitute the settlement, and I am led to that conclusion by the provisions contained in s. 50 of the Settled Land Act, 1882, and s. 104, sub-s. 1, of the Act of 1925. Let me assume for the moment, contrary to my own opinion, that this document, this agreement for sale is one of the documents or instruments under which an estate or interest in land "stands for the time being limited to or in trust for any persons by way of succession." If it be, I can see no answer to the contention that the company is the person who is for the time being under the settlement beneficially entitled to the possession of settled land for the life of another, not holding merely under a lease at a rent. But s. 50 of the Act of 1882 and s. 104 of the new Act provide as follows: "The powers under this Act of a tenant for life are not capable of assignment or release, and do not pass to a person as being, by operation of law or otherwise, an assignee of a tenant for life." Now there is no question that before August 10, 1925, the sixth Earl was tenant for life. When he assigned or contracted to assign his life interest to the corporation it did not therefore acquire the powers of a tenant for life by the assignment or contract, though it might of course be that it acquired

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these powers by reason of other provisions of the Act, not indeed because the powers had been assigned to it but because the corporation has to be regarded as the tenant for life. But the sections go on to say that those powers which cannot be assigned "remain exercisable by the tenant for life after and notwithstanding any assignment." "The tenant for life" there must mean the tenant for life who is assigning his life interest, and he still remains, according to the wording of the Acts, "the tenant for life" and capable of exercising the powers of a tenant for life. It seems to me to follow from that that the Legislature could not have contemplated that where a tenant for life assigns his life interest the document by which he assigns his life interest becomes one of the documents constituting the settlement, or that the assignee by virtue of that fact acquires the powers of a tenant for life under s. 58 of the Act of 1882 or s. 20 of the new Act. I hold, therefore, that this contract to assign the life interest of the sixth Earl to the corporation is not one of the documents which constitute the compound settlement. The corporation was not, by reason of the old Act, and is not by reason of the present Act, to be treated as the tenant for life under that settlement. The sixth Earl is the tenant for life, and the legal estate in fee simple in the Chesterfield Estates will have to be vested in him. So much for the Chesterfield settlement.

Now I have to consider the other settlement, which is the settlement of certain property known as the Highclere Estates made on the marriage of the fifth Earl. The settlement was dated June 25, 1895, and by it the Highclere Estates were limited to such uses as the Earl should appoint for consolidating encumbrances thereon and subject thereto to the use of the fifth Earl for life, with remainder to the use that his wife if she should survive him should receive out of the premises during the residue of her life the yearly rent-charge of 2000*l.*, and subject thereto to the use of the first and other sons of the marriage successively in tail male. The marriage took place on June 26, 1895, and the fifth Earl died on April 5, 1923. Thereupon the sixth Earl became tenant in tail male in possession, subject only to the jointure

rentcharge in favour of his mother. On May 5, 1923, he disentailed, and then on August 10, 1925, he entered into an agreement to sell his estate in fee simple to the corporation that I have already mentioned. There is no doubt, having regard to the provisions of s. 1, sub-s. 1 (v.), of the Settled Land Act, 1925, that the Highclere Estates are now settled land, because s. 1, sub-s. 1, provides as follows: "Any deed, will, agreement for a settlement or other agreement, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, after the commencement of this Act, stands for the time being . . . . (v.) charged, whether voluntarily or in consideration of marriage or by way of family arrangement, and whether immediately or after an interval, with the payment of any rentcharge for the life of any person"—as this does—"creates or is for the purposes of this Act a settlement." But it is said by Mr. Sanger that even under the old law this land remained settled land notwithstanding the disentailing deed, and that the sixth Earl was tenant for life of that settled property. It is, I think, necessary to decide whether that contention is sound or not, because if he was in fact tenant for life of the Highclere property immediately before August 10, 1925, then it would follow that he could not assign his powers and, for the reasons that I have given in the judgment in the other case, it would follow that he would remain tenant for life notwithstanding the agreement for sale to the corporation. The result of such a conclusion would be somewhat far-reaching, because it would seem to follow that in all those cases where before the Act of 1925 a person absolutely entitled subject to family charges had conveyed away portions of his land subject to the charge, giving a covenant to the various purchasers indemnifying them against the charge, the persons taking under those conveyances would not have been even in the position of being tenants for life. The vendor would have still remained the tenant for life under the old law—and it might be a matter

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of some difficulty to determine the relative position of the parties under the new Act, having regard to s. 20, sub-s. 1 (ix.), and the transitional provisions in the Second Schedule. The difficulty would certainly not be diminished by the Amendment Act of 1926.

I must therefore consider whether that argument is sound or not. If it be sound I must give effect to it, however inconvenient the result may be. It is based, in the first instance, on and it traces its origin to a decision of the Court of Appeal in *In re Mundy and Roper's Contract.* (1) With the facts of that case I am not concerned. It is the judgment of Lindley M.R. and Chitty L.J. that is important. Referring to s. 2, sub-s. 1, of the Act of 1882, they say this: "The right interpretation of the words 'stands for the time being limited to or in trust for any persons by way of succession' is a critical point in this case. The words have no technical force. I see no sufficient reason for restricting their meaning. I think that, according to the natural and ordinary meaning of the words, they include the case of a jointure and portions for younger children limited to arise on or after the death of a tenant for life, and the terms of years limited to trustees to secure them. The jointress and the portioners take an interest in the land, and they succeed to their interests in the land on or after the death of the tenant for life." It would be obvious from that passage that what the learned judges were dealing with was a case where interests in jointures or portions would arise—that is to say where the interests would become interests in possession—at a date which had not yet arrived, and that they were of opinion that when the jointress or portioners became entitled in possession they then took an interest in the land by way of succession. They did not, I think, intend to hold that where subject to portions or a rentcharge vested in possession land is vested in a person in fee simple that land is settled land, or that when the jointure comes to an end, or the portions are raised and paid off, that person takes any interest in the land by way of succession. It is important to bear in mind exactly what

(1) [1899] 1 Ch. 275, 290.

those learned judges were dealing with. Now I pass to the case of *In re Lord Wimborne and Browne's Contract* (1), which was a decision of Swinfen Eady J. According to the head-note: "A testator devised freeholds to the vendor for life, with remainders in strict settlement. The property was subsequently disentailed, resettled, and appointed so as to extinguish the vendor's life estate, but the original settlement created by the will was still subsisting in respect of a jointure and portions charged under the powers thereof:— Held, that the vendor could sell under the will alone, so that it was unnecessary to appoint trustees of the compound settlement created by the will and subsequent deeds." But in that case the vendor was originally tenant for life, and as such had power to charge a jointure for his wife and portions for his younger children. By his marriage settlement and in exercise of that power he charged the settled property with a jointure for his wife and portions for his younger children, and limited terms for securing the same. It does not appear when that jointure arose, but I have no doubt that the jointure arose and that the portions became raisable after the death of the tenant for life. So that there was a case similar to that with which the Court of Appeal were dealing in their judgment in *In re Mundy and Roper's Contract*. (2) By virtue of the original settlement the jointure arose and the portions became raisable on the death of the vendor. During his life therefore the land still remained limited by that settlement to persons in succession—namely, to the wife and the children upon the death of the vendor. Swinfen Eady J. in that state of affairs said (3): "In the present case, the original settlement created by the will is still subsisting, as by reason of the jointure and portions charged and remaining to be raised thereunder the lands still stand limited to persons by way of succession under that instrument." Then he refers to *In re Mundy and Roper's Contract*. (2) The next case was the case of *In re Phillimore's Estate*. (4) That was a decision of Farwell J. In that case by a deed dated

(1) [1904] 1 Ch. 537.
(2) [1899] 1 Ch. 275.
(3) [1904] 1 Ch. 537, 541.
(4) [1904] 2 Ch. 460, 463.

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August 3, 1886, certain real and leasehold property was assured to trustees upon trust for such persons as P. should by deed appoint. By deed dated August 4, 1886, P. appointed that this property should be held upon trust for himself for life, and after his death upon trust to pay certain annuities to five persons for their respective lives, and subject thereto in trust for P. absolutely. In effect, therefore, P. was absolutely entitled subject only to the trust to pay certain annuities to five persons for their lives after his death. Treating therefore P. as he ought to be treated, as a person absolutely entitled subject only to these annuities, the land was nevertheless settled land within the meaning of the Settled Land Acts for the reasons given in the judgment in *In re Mundy and Roper's Contract.* (1) It was accordingly held by Farwell J. that the deeds of August 3 and 4 and P.'s will under which P. had settled the estate in strict settlement formed a compound settlement and that the plaintiff, who was tenant for life under the compound settlement, could sell the property discharged from the annuities. A more important decision for the present purpose is that of *In re Marshall's Settlement.* (2) That was a decision of Swinfen Eady J. According to the headnote: "By a marriage settlement, land belonging to the settlor was assured to the settlor for life with remainder (subject to a jointure, portions, and portions term thereby charged and limited) to the settlor in fee:—Held, that, notwithstanding the merger of the life estate, the settlement was a settlement within s. 2, sub-s. 1, of the Settled Land Act, 1882, and the settlor was life tenant within s. 2, sub-s. 5." There again if the facts are looked at it will be seen that the estates were limited by a marriage settlement to the use of the husband for life and after the determination of that estate to the use that, if the wife survive the husband, she should receive a jointure of 400*l.* a year during her life. Then there was a term, which was limited, to commence from the decease of the husband, for the purposes of securing certain portions, and subject to that the land was limited to the husband in fee. The husband

(1) [1899] 1 Ch. 275. (2) [1905] 2 Ch. 325.

was desirous of selling part of the property under the powers of the Settled Land Act, and he took out a summons to determine whether he was the life tenant or a person having powers of a life tenant under the Act. There in point of fact, of course, he was absolutely entitled subject only to the jointure and the portions and the term, all of which came into operation on his death. Meantime, he was entitled to receive the rents and profits during his life. Swinfen Eady J. followed *In re Mundy and Roper's Contract* (1), and came to the conclusion, as indeed he was bound to come to the conclusion having regard to that decision, that the land was limited to persons in succession and, therefore, settled property notwithstanding the fact that the husband was, subject to the annuity and portions, absolutely entitled in fee simple. It was a case very like *In re Mundy and Roper's Contract* (1), where the interest of the jointress and the interest of the portioners arose at a future date—namely, on the death of the husband. Swinfen Eady J., having decided that the land was settled land, found himself able to come to the conclusion that the husband was tenant for life of the settlement within the meaning of s. 2, sub-s. 5, of the Act of 1882. If he had not arrived at that conclusion, then there was a settlement of which there was no tenant for life or person having the powers of a tenant for life, because there is no reference in s. 58 to a person who is absolutely entitled subject to family charges. It will be observed, however, that, according to the very words of the settlement there, the husband was entitled for his life to the rents and profits; it was not that he was entitled to them merely because he was the absolute owner subject to the jointure and the portions; there was an express limitation to him in the settlement during his life. Then in *In re Trafford's Settled Estates* (2) Warrington J. had to deal with a somewhat similar case. There "E. W. T. by his will, dated in 1889, devised certain freehold estates to the use of his son E. S. T. for life and from and after the decease of E. S. T. to the use of his first and other sons successively, according to their

(1) [1899] 1 Ch. 275. (2) [1915] 1 Ch. 9, 13, 15.

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respective seniorities, in tail male with remainders over, and he charged his settled estates with the payment of certain annuities, some of which were still subsisting. E. W. T. died in 1892. E. S. T., the tenant for life, died in 1912, and his eldest son, S. W. J. T., thereupon became tenant in tail in possession of the settled estates. On April 8, 1914, S. W. J. T. executed a disentailing deed, which was duly enrolled, limiting the settled estates to his own use in fee simple. On April 17, 1914"—nine days afterwards—"he executed a resettlement on his marriage of a part of the estates originally settled by the will to the use of himself for life with remainders over." So far as regards the part he resettled there could be no question but that as from that time the property was settled land, and that he was the tenant for life under the settlement. But Warrington J. held that as regards the property not comprised in the resettlement the son could no longer exercise the powers of a tenant for life in respect of it, inasmuch as by virtue of the disentailing deed there was no longer any settlement of that property. He said: "The title of those estates at present"—that is to say the property which had not been resold—"is that, subject to the annuities still subsisting, the estates are limited to the applicant in fee." Those were annuities not to arise at some future date, but annuities that had already arisen and were presently payable. Warrington J. went on: "He desires to sell freed from the annuities created by the testator's will and can only do that if he can sell as a person having the powers of a tenant for life, and for that reason he seeks to have it decided that he has those powers. While he was tenant in tail in possession he came within the provisions of s. 58, sub-s. 1, of the Settled Land Act, 1882." Of course at that time the land was settled, not by reason only of the annuity existing in priority to the tenancy in tail, but by reason of the fact that subject to the tenancy in tail the property was limited over. Then he goes on to point out that when the vendor executed the disentailing deed he was not a person having the powers of a tenant for life who was seeking to get rid of those powers or to assign his

interest or anything of that sort. The effect of the disentailing deed "was merely to enlarge the estate of the tenant in tail to a tenancy in fee simple." Then he went on to say: "What has the applicant done? He has done what the Act says he may do"—that is the Fines and Recoveries Act—"He has disposed of the lands as if he were a tenant in fee simple and has thereby constituted himself a tenant in fee simple. Is that disentailing deed for the purposes of s. 50 an assignment of his estate or interest as tenant in tail under the settlement? It seems to me that it clearly is not. He has never disposed of his estate or interest at all. In my opinion the applicant, although he was once a tenant in tail, has ceased, by reason of the conveyance which he has executed, to be a tenant in tail and to have the powers of a tenant for life." But if *In re Mundy and Roper's Contract* (1) went as far as Mr. Sanger asks me to say that it went it would follow that Warrington J. was wrong in saying that the applicant in the case before him had not the powers of a tenant for life. For he certainly was a person who was entitled in fee simple subject only to certain annuities which were presently payable. The last case to which I shall have to refer is *In re Monckton's Settlement* (2), which came before Neville J. There, according to the headnote, "In 1894 lands were by deed settled to the use of A. for life, remainder to the use of B. (the eldest son of A.) in fee simple if he should survive A., with powers for A. to create portions terms for his younger children and for B. to jointure any wife and to create portions terms for his younger children. In 1896 B. married, and in exercise of his power by deed charged a jointure for his wife and created a portions term for his younger children. In 1916 A. died, having in exercise of his power created portions terms for his younger children, and B. became tenant in fee simple in possession subject to the several portions terms and the jointure." So far as regards the portions which had been created by the father A. those portions took precedence of B.'s interest, but so far as regards the jointure that he had appointed to his wife and the

(1) [1899] 1 Ch. 275. (2) [1917] 1 Ch. 224, 228 229.

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portions terms he had created for the benefit of his children they only took effect on the death of B. So that the position after the death of A. was this: The land was charged with portions for A.'s children immediately raisable; subject thereto the land was vested in B. in fee subject to this, that on B.'s death a jointure rentcharge became payable to his wife and portions were to become raisable for his younger children. Neville J. came to the conclusion that in those circumstances B. was tenant for life of the settlement, which he found and was bound to find, having regard to *In re Mundy and Roper's Contract* (1), was subsisting: he held that B. was tenant for life of that settlement and could exercise all the powers of a tenant for life. He pointed out in his judgment that upon the death of the father the land stood limited in favour of certain portioners with terms for securing the portions and upon the death of B. limited in favour of a jointure and portions with terms to secure them with a further limitation to B. Then he said: "Having regard to the decision of the Court of Appeal in *In re Mundy and Roper's Contract* (1), it is, I think, plain that, having regard to the limitations created by the plaintiff in favour of the jointress and portioners, the estates are limited to or in trust for persons by way of succession." He very carefully guards himself. He does not say that by reason of the portions created by A. the estates were limited to or in trust for persons by way of succession. He is referring, as *In re Mundy and Roper's Contract* (1) referred, to a case where jointure and portions come into being at a future date: when they come into being then an interest in the land arises by succession. Then he refers to the judgment in *In re Mundy and Roper's Contract* (1) and says: "It was argued that here there was no tenant for life, the limitation in the settlement being to the plaintiff in fee. If the limitations had been on the death of the father to the son for life and then to any jointress and portioners appointed under the power given to the plaintiff by the settlement with remainder to the plaintiff in fee, the case would have been precisely within

(1) [1899] 1 Ch. 275.

the decision in *In re Marshall's Settlement* (1)"—as, of course, it would—"But it is said, and said truly, in that case the settlor was given a life tenancy in terms, and that the decision turns upon that. It seems to me that there are two answers to that argument—first that the powers given by the Act do not depend upon the intention of the settlor, so that whether he calls a limitation a limitation for life or whether upon death a fresh limitation is introduced can be of no importance; and, secondly, that s. 2, sub-s. 5, is explicit upon the point, for it defines a tenant for life not as one so called, but as the person who is for the time being under a settlement entitled to the possession of settled land for his life. It is clear here, I think, upon the authorities that, although he is entitled under the words of the settlement to the settled land in fee, other estates are or may be let in at his death, thereby reducing his immediate estate to an estate for life." In that way he was enabled to arrive at the conclusion, not only that it was settled land, but that there was a tenant for life of that settled land.

Those are the only authorities that have been cited to me as bearing upon the point with which I have to deal, and in my opinion they do not in any way support the proposition that, where land is vested in a person in fee simple subject to a jointure rentcharge or portions vested in possession, the land stands limited to or in trust for any persons in succession within the meaning of those words in s. 2, sub-s. 1, of the Settled Land Act, 1882. I therefore arrive at the conclusion that at the time when the Act of 1925 came into force, that is to say under the old law, this land was not settled land, but that it was merely land vested in somebody in fee simple subject to an existing family charge.

I must now turn to the Act of 1925 for the purpose of ascertaining in whom the legal estate in the Highclere Estate ought to be vested. For it admittedly became settled land when that Act came into force by reason of the provisions of sub-s. (v.) of s. 1, sub-s. 1.

Now who is the tenant for life? Sect. 19 says he is "The

(1) [1905] 2 Ch. 325.

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person of full age who is for the time being beneficially entitled under a settlement to possession of settled land for his life." Having regard to the words of s. 1, sub-s. 1, the settlement must here mean the instrument whereby the land stands charged for the time being. But in this case the only instrument by virtue of which the property is charged is the settlement made on June 25, 1895; it does not, at any rate, include the agreement to sell to the company, which did not in any way charge or operate to charge the property, with the family charge. There is nothing, therefore, in s. 1, sub-s. 1, to suggest that in a case like this the settlement includes the conveyance or agreement to convey to the corporation. But neither Lord Carnarvon nor the company appears to me to be a person who under s. 19, sub-s. 1, is beneficially entitled under the settlement to possession of the settled land for life. The company, for the reason I have given, are not entitled under the settlement at all, and Lord Carnarvon does not appear to me to be that person, because he is not entitled, as I understand the words, for life: he is entitled for a great deal more than his life. I think the words "for life" in this section mean for life and not for a greater interest. Sect. 19, sub-s. 1, appears to me to have no application to the matter. Now I turn to s. 20, and in sub-s. 1 I find this: "Each of the following persons being of full age shall, when his estate or interest is in possession, have the powers of a tenant for life under this Act (namely) . . . . (ix.) A person beneficially entitled to land for an estate in fee simple"—I observe it does not say "under any settlement"—"or for a term of years absolute subject to any estates, interests, charges, or powers of charging, subsisting or capable of being exercised under a settlement." The charge arose under the settlement of June 25, 1895, and the person who is beneficially entitled to the land for an estate in fee simple subject to the charge created by the settlement, is, in my opinion, the company.

I therefore come to the conclusion that this property is settled land by virtue and by virtue only of s. 1, sub-s. 1 (v.), of the Settled Land Act of 1925, and that by virtue of s. 20,

sub-s. 1 (ix.), the company has the powers of a tenant for life and is, therefore, the tenant for life for the purposes of the vesting deed.

[At the conclusion of the hearing of the above summonses counsel asked for a direction as to the correct way to entitle applications of this nature, in view of Order LV., r. 14A (3.), which provides as follows: "Every such summons shall be intituled in the matter of the Act or Acts under which the application is made, and in the matter of the will, settlement, trust, or property, as the case may be, to which the summons relates. . . . ."

ROMER J. said that, in his view, it could not have been intended to alter the invariable practice of setting out the title of the material statute or statutes beneath the statement of the subject-matter of the application.]

Solicitors: *Frere, Cholmeley & Co.*

J. L. D.

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[1921. M. 1180.]

Partnership—Death of Partner—Dissolution—Partnership Business carried on for further Period—Profits—How distributable—Form of Inquiry—Onus—Partnership Act, 1890 (53 *& 54 Vict. c.* 39), *s.* 42.

A partnership business was, after the death of one of the partners, carried on for a further period under the management of the plaintiff, who was one of the surviving partners. At the end of that period an order of the Court was made which declared that the partnership had, in the opinion of the Court, been dissolved by the death of the deceased partner, and directed the plaintiff to commence an action for the winding up of the partnership business. In the course of this action a question arose as to the rights of the parties in respect of profits earned during the above mentioned period:—

Held, that the legal personal representatives of the deceased partner were entitled in respect of any profits earned by the surviving partners, during the period in question, which were attributable to the user of any partnership assets, to a share thereof proportionate to his share in the total assets of the firm at the date of the dissolution of the partnership; and that inquiries must be made for the purpose of ascertaining whether any and, if so, what part of those profits

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(after deducting such sum as should, after inquiry, be certified to be proper to be allowed to the plaintiff in respect of his personal supervision and management of the business during the period) had been earned during the period by the surviving partners otherwise than by the user of the partnership assets including goodwill.

SUMMONS.

At the date of his death Charles Calder and his son, Charles James Calder, were and had since 1909 been carrying on the business of timber merchants under articles of partnership. Charles Calder died on October 19, 1913, having by his will, in exercise of a power given to him under the articles of partnership, nominated the trustees of his will to succeed to the whole of his share in the partnership business and in the capital and future profits thereof during the period stated in the will, and by a codicil nominated Charles John Manley to succeed as from his death to a proportion of his share of the business. The will and codicil were duly proved by Charles James Calder, Charles John Manley, and August Sartori, who had been duly appointed executors and trustees thereof.

After the death of Charles Calder the business was carried on in partnership between Charles James Calder, Charles John Manley, and the trustees of the will of Charles Calder until the death of Charles James Calder. Charles James Calder died on May 18, 1919, having by his will appointed executors thereof. His will was proved on January 5, 1922. After the death of Charles James Calder the business was carried on by Charles John Manley and the surviving trustees of the will of Charles Calder, under the management of Charles John Manley.

By an order of the Court made on March 18, 1921, Charles John Manley was directed, in the events which had happened, to commence an action for the winding up of the partnership business. In obedience to that order this action was commenced, and by an order made in the action dated April 8, 1921, the Court being of opinion that the partnership was dissolved by the death of Charles James Calder, it was ordered that the following account and inquiry be taken

and made—namely, an account of all dealings and transactions as from May 18, 1919, of the business formerly carried on in the partnership and an inquiry of what the credits, property, and effects then belonging to the partnership consisted.

The plaintiff and the surviving trustees of the will of Charles Calder continued to carry on the partnership business under the management of the plaintiff without any settlement of accounts as between the firm and the estate of Charles James Calder until April 26, 1922, when the partnership business and assets were transferred to Calders, Ld., pursuant to an order made in the action dated March 28, 1922.

Between May 18, 1919, the date of the dissolution of the partnership, and March 31, 1921 (the date as on which the business and the assets were sold to Calders, Ld.), profits were made in the business. No part of the assets of the business was set aside or appropriated to meet the share of Charles James Calder before completion of the sale.

This summons was taken out by the executors of Charles James Calder for the purpose of ascertaining the rights of the parties in respect of the profits earned between May 18, 1919, and March 31, 1921.

Farwell K.C. and *C. J. Parton* for the executors of Charles James Calder. The object of this summons is to ascertain whether the executors of a deceased partner are entitled to a share of the profits earned between the date of the declaration of dissolution and the date of the sale of the business. These executors are entitled to a share of the profits during the two years between those two dates. The question turns mainly on s. 42 of the Partnership Act, 1890. The Court will ascertain the amount attributable by giving to the deceased partner a share in the same proportion as his capital bears to the whole of the capital in the business : see *Hugh Stevenson & Sons* v. *Aktiengesellschaft für Cartonnagen-Industrie.* (1) There is no conceivable reason for excluding these executors from participation in these profits.

Manning K.C. and *Russell Gilbert* for the plaintiff Charles

(1) [1918] A. C. 239, 246, 250, 254.

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John Manley. The plaintiff is entitled, as a partner, to a proportion of the profits. He is also one of the surviving trustees of the will of Charles Calder. The Court has to ascertain what part, if any, of the profits is attributable to the share of the deceased partner in the assets and whether these profits have been earned by any part of those assets. It is very difficult to determine a case of this kind. There have been cases where it has been decided that no part of such profits as these was attributable to the assets of the deceased partner: see Lindley on Partnership, 9th ed., p. 710. The question is whether any of the profits earned after the death of Charles James Calder were attributable to the use of his capital. These profits were, in reality, earned by the managers. It is a question of fact in each case. Sect. 42 of the Act refers to shares of profits made since dissolution: see also Lindley on Partnership, 9th ed., p. 715, para. 3; see also *Willett* v. *Blanford*. (1) That decision was approved in *Simpson* v. *Chapman*. (2)

[They also referred to *Mellersh* v. *Keen*. (3)]

The submission on behalf of the applicants is that it is enough for them to show that profits were earned since the dissolution, i.e., that if they are able to do so, it follows that some of those profits belong to the deceased partner. That is not the right method of approaching the question. The Court must know more of the particular manner in which the business was carried on before finding out what part of the profits was used in respect of the share of the deceased partner. There is no definite evidence showing how the profits were ascertained, and the Court is not at present in possession of the answer to this question.

Sir Thomas Hughes K.C. and *Beebee* for the defendant Sartori, a trustee of the will of Charles Calder. The trustees of this will are in the same position as the plaintiff. Sect. 42 of the Act is declaratory, and does not make any alteration in the law. The principle must apply even where one of two partners dies and goes out. If the executors leave the surviving

(1) (1842) 1 Hare, 253, 265, 269. (2) (1853) 4 D. M. & G. 154, 171.
(3) (1859) 27 Beav. 236, 242.

partner to do the work it is not unreasonable to give to the executors of a deceased partner 5 per cent. interest on the capital of the deceased partner and to allow the surviving partners to obtain the remainder of the profits. If the profits are very great the executors have a choice under the section. The executors of Charles James Calder have not given any evidence upon which the Court can find that any share of the profits is attributable to the user of their share of the partnership assets. Until they do so they are not entitled to more than 5 per cent. on the amount of their share.

Farwell K.C. in reply. In the absence of satisfactory evidence to the contrary the applicants are entitled to a share in these profits in proportion to the share of the deceased partner in the assets.

ROMER J. The applicants in this case are the legal personal representatives of one Charles James Calder, who died on May 18, 1919. At the date of his death he was carrying on a timber merchant's business in partnership, the other partners being the plaintiff in the action, Mr. Manley, and the plaintiff, Mr. Manley, and the first defendant, August Sartori, as the legal personal representatives of a Mr. Charles Calder, who had died in the year 1913. On the death of Mr. Charles James Calder, as has now been judicially determined, there was a dissolution of the whole partnership, that is to say, his share did not survive to the other partners, subject to their paying him the value of his share, and accordingly the whole of the assets of the partnership should then have been realized and applied in payment of the debts and liabilities of the firm, the surplus assets being applied in payment of what might be due to the respective partners. That would be in accordance with the provisions of s. 39 of the Partnership Act of 1890. That, in point of fact, was not done, but the other partners, the trustees of Charles Calder and Mr. Manley, continued to carry on the business until ultimately, in the year 1922, the whole of the assets of the business were sold as from March 31, 1921.

The question which arises upon this summons is as to the

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rights of the parties in the profits earned between the date of Mr. Charles James Calder's death in May, 1919, and March 31, 1921. Some things appear to be reasonably clear in this connection. Where, in such a case, the surviving partners, instead of realizing the assets and distributing the proceeds amongst the parties in accordance with their rights and interests, choose to carry on the business and make profits by virtue of the employment of any of the partnership assets, then, subject no doubt to making a proper allowance to the surviving partners for their trouble in so carrying on the business, such profits belong to all the persons interested in the partnership assets by means of which the profits have been earned in accordance with their rights and interests in those assets; that is to say, proportionately to their interests in those assets. That has been laid down in numerous cases and is affirmed by s. 42 of the Partnership Act of 1890. There appears to have been an idea at one time that, in such a case, the partners were interested in the profits so made in the shares in which they would have been entitled to the profits if they had been earned while the partnership was a going concern. For instance, it was suggested that, supposing a partner brought no capital into the partnership but in consequence of his skill or for some other reason was entitled under the partnership articles to receive a particular share, say a one-third share, of the profits, then if, after his death, the surviving partner who brought all the capital into the concern carried on the business and made a profit, the executors of the deceased partner were entitled to one-third of that profit. That that is not so was explained by Wigram V.-C. in *Willett* v. *Blanford*. (1) He pointed out, in effect, that where the profits had been earned by reason of using the assets of the partnership, those profits were divisible between people who, in the events which had happened, were interested in the partnership assets: they were not divisible between the parties in accordance with their rights and interests in profits earned while the partnership was a going concern. That is expressed in s. 42 of the

(1) 1 Hare, 253.

Partnership Act as follows: "Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of 5 per cent. per annum on the amount of his share of the partnership assets." Of course, the reference there to the deceased partner's share of the partnership assets is due to this, that he is only entitled to his proper proportion of the profits earned by the partnership assets. For the purposes of ascertaining what it is in which he is entitled to share, you must ascertain what profits have been earned by the utilization of the assets of the partnership as a whole. Once you have found that, then having ascertained what the deceased partner's interest in those assets was, you can easily ascertain his share in the profits earned by them, and in that sense it is right to say that the legal personal representatives of a deceased partner are entitled to the profits made by the utilization of his share of the partnership assets. I say that, because I cannot help thinking that in the present case there has been some little misapprehension upon the matter. For instance, there are passages in the statement of facts which seem to suggest that the legal personal representatives of Charles James Calder are not entitled to any part of the profits earned since his death, because at all material times there have been liquid assets of the partnership more than sufficient to pay out to his legal personal representatives the capital belonging to his estate. Now the rights of the deceased partner or his legal personal representatives are rights over all the assets of the partnership. He has an unascertained interest in every single asset of the partnership, and it is not right to regard him as being merely entitled to a particular sum of cash ascertained from the

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balance-sheet of the partnership as drawn up at the date of his death. So that if, after the death of Charles James Calder, any profits were in fact earned by using any single partnership asset, the profits so far as attributable to the use of that partnership asset are profits in which the executors of Charles James Calder have a share to the extent of their share in that particular asset; that is to say, in proportion to their share in the total assets of the partnership. But, as was pointed out by Wigram V.-C. in *Willett* v. *Blanford* (1), it does not necessarily follow that because the surviving partners have been carrying on the business the profits or the whole of the profits are attributable to the use of the partnership assets. Wigram V.-C. said this, and these passages were expressly approved by the Court of Appeal in a later case of *Simpson* v. *Chapman* (2): "I have again considered the subject"—that is the subject with which I am dealing—"and read the cases to which I was referred, and I remain of the opinion I expressed at the close of the argument, that there is no rule of this Court applicable alike to all cases; and that there is no rule, which is so established or general in its application, that it is to be taken to be the general rule until circumstances are shown which displace it. The facts of each case must be fully brought under the view of the Court before it can be in a position to state what justice to the party seeking its protection may require, with due regard to the interests of other parties." He also said this: "I consider myself, therefore, bound by authority and reason to hold that the nature of the trade, the manner of carrying it on, the capital employed, the state of the account between the partnership and the deceased partner at the time of his death, and the conduct of parties after his death, may materially affect the rights of the parties; and that I must have more information than I now possess before I can safely decide this case." In other words, it may well be that in a particular case profits have been earned by the surviving partner not by reason of the use of any asset of the partnership, but purely and solely by reason of

(1) 1 Hare, 253, 269, 272. (2) 4 D. M. & G. 154.

the exercise of skill and diligence by the surviving partner; or it may appear that the profits have been wholly or partly earned not by reason of the use of the assets of the partnership, but by reason of the fact that the surviving partner himself provided further assets and further capital by means of which the profit has been earned. Those profits, so far as earned by sources outside the partnership assets, are not profits in which the executors of the deceased partner could be entitled to any share. Applying those observations to the present case, I am met by this difficulty, that there is no evidence, so I am told—my attention has not been called to the affidavits, but everybody is agreed that there is no evidence—from which the Court can answer definitely the question whether the profits, which undoubtedly have been earned by carrying on the business, have been earned, or whether any part of those profits has been earned, by using any of the assets of the partnership. I think it was the view of the learned Master that in the circumstances the onus was upon the applicants to show affirmatively that the profits or some part of the profits had been earned by using the partnership assets or, as the Master phrases it, the deceased partner's share in the capital. But it appears to me that that is not so for these reasons: in Lindley on Partnership, 9th ed., p. 710, I find this stated: "Special inquiries on this subject"—that is the question of the right of a deceased partner to a share of profits made subsequent to his decease—"are almost always necessary, and if it can be shown that, having regard to the nature of the business or other circumstances, the profits which have been made cannot be justly attributed to the use of the capital or assets of the late partner, his prima facie right to share such profits will be effectually rebutted." By that I understand the learned author to mean that where surviving partners continue to carry on the business, prima facie they are carrying it on by reason of their possession of the assets of the partnership; and the executors of the deceased partner are prima facie entitled to a share of the profits proportionate to his share

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in the assets of the partnership. It is for the surviving partners to show, if they can, that the profits have been earned wholly or partly by means other than the utilization of the partnership assets.

In those circumstances, inasmuch as it appears to me that the parties in the case have so far not devoted their attention to the real point which has to be ascertained, I think I must direct an inquiry, and, subject to what may be said by anybody as to the precise form of that inquiry, I think the purport of it should be to ascertain what profits have been earned by the surviving partners by the use of the assets of the partnership since May, 1919, down to March 31, 1921. I wish to make it clear that amongst the assets of the partnership I include the goodwill of the partnership, notwithstanding the fact that the goodwill may not have been capable of being valued in cash. I am told that nothing appears in the partnership balance-sheet in respect of goodwill, and that when the business was sold no value was put upon the goodwill. But, notwithstanding that the goodwill may not have been capable of being ascertained in pounds, shillings and pence, I have no doubt there was to some extent a goodwill in this business, that is to say, there was always the possibility of customers returning to the old firm. So far as use was made of that goodwill, then profits made by that use will be profits earned by the use of a partnership asset, and as such will have to be brought into this account.

The order as drawn up was as follows :—

This Court doth declare that the legal personal representatives of the above named Charles James Calder deceased are entitled in respect of any profits earned by the surviving partners between 18th May 1919, and 31st March 1921, which are attributable to the user of any partnership assets to a share thereof proportionate to the share of the said Charles James Calder in the total assets of the firm in the said judgment mentioned on the said 18th May 1919 the date of the dissolution of the partnership And this Court doth order that the following enquiries be made that is to say (1.) An enquiry what would be proper to be allowed to the plaintiff Charles John Manley in respect of his personal superintendence and management of the business of the said partnership between the 18th May 1919 and 26th April 1922 (2.) An enquiry what profits after deducting such sum as shall

be certified to be proper to be allowed to the plaintiff Charles John Manley under Enquiry No. 1 hereinbefore directed have been earned by the surviving partners in respect of the partnership business between the said 18th May 1919 and 31st March 1921 (3.) An enquiry whether any and if so what part of such profits was earned otherwise than by the user of the partnership assets including goodwill And the costs of the said application are to be costs in the action including the costs of a shorthand note of this judgment and a transcript thereof for each set of parties to the said summons And the rest of the said summons is to stand over and the parties are to be at liberty to apply.

Solicitors: *Keene, Marsland, Bryden & Besant, for C. D. Forster & Lester, Newcastle-on-Tyne; E. Flux, Leadbitter & Neighbour, for Leadbitter & Harvey, Newcastle-on-Tyne; Broad & Son.*

J. L. D.

CUMMINS *v.* BOND.

[1926. C. 1059.]

Copyright — Infringement — Original literary Work — Ownership — Automatic Writings—"Chronicle of Cleophas"—Licence—Estoppel—Copyright Act, 1911 (1 & 2 *Geo.* 5, *c.* 46), *ss.* 1, 2, 5, 16.

The plaintiff was a lady journalist and practised as a medium in "psychic" séances. During a series of sittings in the company of another lady and the defendant, she produced a large amount of script by automatic writing entitled "The Chronicle of Cleophas," which purported to relate the acts and teaching of the Apostles. It was written at high speed under the alleged influence of an external psychic agent, and in archaistic language without stops, and not in the ordinary handwriting of the plaintiff. At the termination of each sitting the defendant, who was an architect and specially interested in automatic writings relating to the Abbey of Glastonbury, was permitted to take away the script in order that he might transcribe, punctuate, and arrange it in chapters and verses, and then, as the plaintiff alleged, return it to her. The defendant claimed to have annotated the script, and added historical and explanatory notes, and to be entitled to publish the work so arranged in book form. Some extracts from the script were in fact published in February, 1926, by the defendant in a spiritualist paper, with the knowledge and acquiescence of the plaintiff. In an action to determine who was the owner of the copyright in this work:—

Held, that the plaintiff having written every word of the original script of this work was entitled to a declaration that she was the owner of the copyright therein.

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Held further, that it was a delusion on the part of the defendant that he had in any way contributed to the production of the work, and his claim to joint authorship failed, and he must deliver up to the plaintiff such parts of the original manuscript as had not already been handed to her.

WITNESS ACTION.

This was an action by Miss Geraldine Dorothy Cummins, of 178 Brompton Road, London, against Frederick Bligh Bond, of Inkerman Terrace, Kensington, seeking to establish her right to the copyright in a literary work entitled "The Chronicle of Cleophas," and for an injunction to restrain the defendant from publishing this work in book form or any extract from it.

The plaintiff was by profession a journalist and writer and was also engaged in psychic research, acting as a spiritualist medium at séances. For some years she had practised automatic writing, and early in 1924 wrote regularly in company with a friend, Miss Edith Beatrice Gibbes. The method of writing was as follows: The plaintiff covered her eyes with her left hand, took a pencil in her right hand and rested it on a wad of foolscap paper. After a while she passed into a sort of dream state, and her hand commenced to write very rapidly, sometimes over 2000 words in an hour and a half without any pause. The defendant was an architect and much interested in recent discoveries at the Abbey of Glastonbury and in automatic writing. He was invited by Miss Gibbes to join the plaintiff and herself when the automatic writing in "The Chronicle of Cleophas" commenced in May, 1925, and after each sitting he took away the original script with the plaintiff's consent and transcribed it, punctuated it, and arranged it in paragraphs, and returned a copy of it so arranged to the plaintiff. From time to time during the séances the defendant placed his fingers upon the back of the plaintiff's hand when she was writing, but it made no difference to the mode of writing, except that it became rather slower.

There was some conversation in the course of the sittings as to possible publication of "The Chronicle," and the

defendant in July, 1925, suggested that any profits arising from such publication should be divided equally between the three—namely, the plaintiff, Miss Gibbes, and himself. There was no conversation at first with regard to the ownership of the copyright. Miss Gibbes subsequently informed the defendant by letter that she understood the copyright of the writings belonged to the plaintiff, and he did not then dispute it. In November, 1925, the defendant wrote a letter to Miss Gibbes suggesting that the American and colonial rights should be vested in himself alone, leaving the other rights to be divided in thirds. This was objected to. Attempts were made to have an agreement drawn up between the parties, but no concluded agreement was ever come to. There was evidence by Miss Gibbes, who was present at every sitting at which "The Chronicle of Cleophas" was being produced, that it was on June 14, 1925, that the plaintiff first chose and wrote the title to the work as "The Chronicle of Cleophas" (the name Cleophas appears twice in the New Testament as one of the followers of Christ). It was proved that the whole of the manuscript of the work was written by the plaintiff alone in her own automatic writing, and none of it was dictated by the defendant or any other living person. The nature of the writing was archaic, of the sixteenth and seventeenth centuries. The plaintiff claimed to have the copyright in her writings, and by a letter of December 1, 1925, she wrote to the defendant saying that she had assigned all the original manuscripts, which the defendant held, and the rights thereto to Miss Gibbes. No written assignment, however, of the copyright was ever made. Before 1925 none of the script had been published, but later on, about February, 1926, certain extracts from the script were published by the defendant in the Christian Spiritualist paper with the knowledge and alleged acquiescence of the plaintiff. The printers and publishers of the said paper were made defendants to the action by the writ issued on March 17, 1926, but the action was subsequently discontinued against them.

By her statement of claim the plaintiff alleged that the

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publication by the defendant of substantial parts of the script in the Christian Spiritualist was without her consent and in breach of the confidence reposed in the defendant, and claimed: (1.) A declaration that the work "The Chronicle of Cleophas" was an original literary work in which copyright subsisted, and that the plaintiff was the owner thereof. (2.) An injunction restraining the defendant from printing, publishing, selling, or otherwise disposing of any copies of the whole or any substantial part of the said work and otherwise infringing her copyright therein. (4.) Delivery up by the defendant Bond of such parts of the original manuscript of the said work as were delivered to him by the plaintiff.

The defendant Bond, by his statement of defence, denied that the plaintiff was the owner of any copyright which might subsist in the automatic writings, which were wholly communicated in substance and form by a psychic agent, and that it was not an original literary work in which copyright could subsist. If copyright were held to subsist the defendant claimed to be the owner thereof, as the writings dealing with the acts and teachings of the Apostles were personally addressed to him, and he was a necessary element in the production of the work. He further pleaded that the manuscripts were all given to him by Miss Gibbes, with the knowledge of the plaintiff, as a gift, so that he might make arrangements with a view to the publication of the same in volume form; and that the plaintiff had impliedly sanctioned or acquiesced in the publication of the articles and extracts in the Christian Spiritualist, and had therefore waived any rights to which she might otherwise have been entitled. The defendant counterclaimed for a declaration that he was the owner of the copyright in "The Chronicle of Cleophas."

Vaisey K.C. and *Macgillivray* for the plaintiff. The plaintiff is the only human being through whom the ideas contained in these automatic scripts are rendered visible in a material form. It is an original literary work, and she

is the sole author of it and entitled to the copyright therein. The handwriting is admittedly the handwriting of the plaintiff, and the words were not dictated by any one. It is submitted that the Court is not concerned with the question of the inspiration of the work by any psychic agency, but with the question who is the owner of the copyright. One of the defences to the action is that this is transcendental and not a matter in which copyright can subsist at all, but that defence cannot be sustained. The facts are practically undisputed. The automatic writing began at first in the presence of Miss Beatrice Gibbes alone, and the defendant was invited by her to the séances as one also interested in psychical research and automatic writings, especially in regard to Glastonbury Abbey, but it is impossible that he can successfully claim to be owner of the copyright. The automatic writing went on just as well when he was not present as when he was. When a contract was suggested as to the right of publication the first point dealt with was that the copyright in the manuscript should be the property of the plaintiff; but no concluded agreement was ever arrived at. As a fact the plaintiff never parted with the ownership of the copyright. Nor can the suggestion of joint ownership be established. Evidence was given by the plaintiff and Miss Gibbes, and then by the defendant.

Moritz K.C. and *Geoffrey Hutchinson* for the defendant Bond. The presence of the defendant was necessary at the various séances for the production of this work; it is a question whether it can be the subject of copyright. If he is not entitled as sole owner of the copyright, which he does not now claim, it was a case of joint ownership according to s. 16 of the Copyright Act, 1911. The publication of parts of the script in the articles in the Christian Spiritualist was with the undoubted knowledge and acquiescence of the plaintiff. That was a licence to publish which was irrevocable. [They referred to *Walter* v. *Lane* (1); *Wood* v. *Leadbitter* (2); *Hurst* v. *Picture Theatres, Ld.* (3); *British*

(1) [1900] A. C. 539. (2) (1845) 13 M. & W. 838.
(3) [1915] 1 K. B. 1.

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Actors Film Co., Ld. v. *Glover.* (1)] The plaintiff is estopped from disputing the effect of her actions.

Vaisey K.C. in reply referred to *Cescinsky* v. *G. Routledge & Sons, Ld.* (2), and *University of London Press, Ld.* v. *University Tutorial Press, Ld.* (3)

EVE J. The issue in this action is reduced to the simple question who, if any one, is the owner of the copyright in this work. Prima facie it is the author, and so far as this world is concerned there can be no doubt who is the author here, for it has been abundantly proved that the plaintiff is the writer of every word to be found in this bundle of original script. But the plaintiff and her witness and the defendant are all of opinion—and I do not doubt that the opinion is an honest one—that the true originator of all that is to be found in these documents is some being no longer inhabiting this world, and who has been out of it for a length of time sufficient to justify the hope that he has no reasons for wishing to return to it.

According to the case put forward by those entertaining the opinion I have referred to the individual in question is particularly desirous of assisting in further discoveries relating to the ancient Abbey of Glastonbury, and he chooses the Brompton Road as the locality in which, and the plaintiff as the medium through whom, his views as to further works to be undertaken on the site of the Abbey shall be communicated to the persons engaged in the work of excavation. He is sufficiently considerate not to do so in language so antiquated as not to be understood by the excavators and others engaged in the interesting operations, but in order not to appear of too modern an epoch he selects a medium capable of translating his messages into language appropriate to a period some sixteen or seventeen centuries after his death. I am not impugning the honesty of persons who believe, and of the parties to this action who say that they believe, that this long departed being is the true source from which the

(1) [1918] 1 K. B. 299.
(2) Macgillivray's Copyright Cases, 1911–16, pp. 308, 311.
(3) [1916] 2 Ch. 601.

contents of these documents emanate; but I think I have stated enough with regard to the antiquity of the source and the language in which the communications are written to indicate that they could not have reached us in this form without the active co-operation of some agent competent to translate them from the language in which they were communicated to her into something more intelligible to persons of the present day. The plaintiff claims to be this agent and to possess, and the defendant admits that she does possess, some qualification enabling her, when in a more or less unconscious condition, to reproduce in language understandable by those who have the time and inclination to read it, information supplied to her from the source referred to in language with which the plaintiff has no acquaintance when fully awake.

From this it would almost seem as though the individual who has been dead and buried for some 1900 odd years and the plaintiff ought to be regarded as the joint authors and owners of the copyright, but inasmuch as I do not feel myself competent to make any declaration in his favour, and recognizing as I do that I have no jurisdiction extending to the sphere in which he moves, I think I ought to confine myself when inquiring who is the author to individuals who were alive when the work first came into existence and to conditions which the legislature in 1911 may reasonably be presumed to have contemplated. So doing it would seem to be clear that the authorship rests with this lady, to whose gift of extremely rapid writing coupled with a peculiar ability to reproduce in archaic English matter communicated to her in some unknown tongue we owe the production of these documents. But the defendant disputes the plaintiff's right to be considered the sole author, alleging that he was an element and a necessary element in the production, and claiming, if the authorship is to be confined to persons resident in this world, that he is entitled to the rights incident to authorship jointly with the plaintiff.

In the course of the trial, after reading the correspondence,

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and hearing the evidence of Miss Gibbes, I expressed an unfavourable opinion of the defendant's conduct in certain respects. For one thing he had at a very early stage of his acquaintance with that lady commenced to borrow money from her, and when at a later date he was called upon to repay the sums so borrowed he set up a wholly insupportable story that the moneys had been paid to him as a gift; and for another, when he was submitting a complicated agreement for the approval of the two ladies and inducing them to believe that he desired them to take legal advice thereon, he was at the same time urging a mutual friend to obtain their approval and execution of the same without taking any such advice. Since I expressed that unfavourable opinion I have seen and heard the defendant in the box, and although his conduct in the matters I have referred to cannot but be regarded as involving grave errors of judgment, I do not think he was actuated by the sordid motives which his conduct was certainly calculated to suggest. He is an individual upon whose memory little reliance can be placed—he is of an imaginative temperament and regards the alleged supernatural incidents connected with this work with a reverence that is almost fanatical, and he has, I think, in more than one incident shown that he is occasionally subject to hallucinations. His claim to be considered a joint author is suggestive of an hallucination, for it is based upon the assertion that by his presence at the séances where the writing took place he in some way transmitted from his brain to the unconscious brain of the medium the classical and historical references which are to be found in these documents. He frankly admits that he does not appreciate how it was done, or to what extent he did it; but he has evidently brought himself to believe that he did contribute materially to the composition of the work and that his contribution was made by means of some silent transfer from his brain to that of the unconscious medium of phrases and allusions with which he was familiar but of which she knew nothing. But inasmuch as the medium is credited with a power to translate language of which she knew nothing into archaic English,

of which she was almost equally ignorant, and at a phenomenal pace, it does not appear necessary to fall back on the defendant's presence in order to explain the classical and historical references which he maintains must have emanated from his brain. They may well have originated in the brain of the medium herself. In these circumstances I am quite unable to hold that the defendant has made out any case entitling him to be treated as a joint author. I think he is labouring under a complete delusion in thinking that he in any way contributed to the production of these documents.

Alternatively failing to establish any claim on his own behalf he submits that there is no copyright in the work at all, that it has come from a far off locality which I cannot specify, and that the plaintiff is the mere conduit pipe by which it has been conveyed to this world. I do not think that is a fair appreciation of the plaintiff's activities, they obviously involved a great deal more than mere repetition; but, apart altogether from these considerations, the conclusion which the defendant invites me to come to in this submission involves the expression of an opinion I am not prepared to make, that the authorship and copyright rest with some one already domiciled on the other side of the inevitable river. That is a matter I must leave for solution by others more competent to decide it than I am. I can only look upon the matter as a terrestrial one, of the earth earthy, and I propose to deal with it on that footing. In my opinion the plaintiff has made out her case, and the copyright rests with her.

Upon the same footing it has been further contended on behalf of the defendant that an agreement was come to between him and the plaintiff under which he is beneficially interested in the copyright, or alternatively that the conduct of the plaintiff has been such as to estop her from denying that he has such an interest. In order to determine these questions the evidence and correspondence require some examination. [His Lordship proceeded to go through these in detail and concluded :] It is quite clear that no agreement was ever concluded, and I am quite unable to hold that the

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plaintiff ever abandoned the position she took up in the latter part of the year 1925 or ever so conducted herself as to preclude her from insisting on the claims put forward in this action. Accordingly I hold she is entitled to the declaration for which she asks, that is to say, a declaration that she is the owner of the copyright in this work—it must be identified in some way—delivery up of such parts of the original manuscript as have not already been handed to her, and the defendant must pay the costs of the action. The counterclaim by which the defendant seeks a declaration that he is entitled to the copyright is dismissed with costs.

Solicitors: *Field, Roscoe & Co.; Scott & Son.*

G. M.

LAWRENCE J.
1926
July 19.

In re DARWEN AND PEARCE.

[1103 of 1925.]

Principal and Surety—Interference with Rights of Surety—Guarantee of Payment of Calls on Shares—Forfeiture of Shares—Creation of new Liability—Loss of Right to Lien on Shares—Discharge of Surety—Proof against Bankrupt Sureties.

On December 29, 1920, D. and P.—who afterwards became bankrupt—joined with others in entering into an agreement with a company, whereby they guaranteed to them the payment of all the instalments then owing upon the shares in the company specified in the schedule to the agreement, the amount of D. and P.'s liability being limited to the sum therein mentioned. The shareholders having been served with notice calling upon them to pay the instalments due on their respective shares on pain of forfeiture, and D. and P. also having been required to pay the same on or before February 17, 1925, in case of non-compliance by the shareholders with the notice, and default in payment having been made by both the shareholders and by D. and P., the company forfeited the bulk of the shares in pursuance of the power conferred upon them by their articles of association. Article 31 was as follows: "Any member whose shares have been forfeited shall, notwithstanding such forfeiture, be liable to pay to the company all calls or other moneys, interest and expenses, whether presently payable or not, owing in respect of such shares at the time of forfeiture, together with interest thereon from the time of forfeiture until payment at the rate of 10 per cent. per annum or such less rate as may be fixed by the Board." On September 9, 1925, a receiving order in bankruptcy was made against D. and P., and on April 10 the company lodged their

proof for the amount claimed to be due on the guarantee. Upon a motion by the company for the reversal of the decision of the trustee in rejecting their proof:—

Held, first, that the right created by art. 31 was a new right which arose upon the forfeiture of the shares and one which placed a more onerous obligation upon the shareholders than if the shares had not been forfeited. The forfeiture, therefore, was an interference with the rights of the sureties as against the principal debtors. The principle of *Stocken's Case* (1868) L. R. 3 Ch. 412 and *Ladies' Dress Association* v. *Pulbrook* [1900] 2 Q. B. 376 applied.

Secondly, that the company had by exercising their option to forfeit the shares deprived the sureties of their lien on the shares which they would have been entitled to, had the company, in lieu of forfeiture, compelled them to pay the calls; with the result that, upon the principles stated in *Polak* v. *Everett* (1876) 1 Q. B. D. 675, D. and P. were discharged from their liability as sureties under the guarantee, and the decision of the trustee in their bankruptcy in rejecting the proof of the company was right.

MOTION.

This was a motion by the Associated Paper Mills, Ld. (hereinafter referred to as "the company"), against the trustee in bankruptcy of Julian Darwen and Arthur William Pearce for an order that the decision of the trustee dated April 14, 1926, whereby he rejected the whole proof of the debt sworn on behalf of the company on April 9, 1926, for 63,301*l.* 10*s.* might be reversed and that the proof might be admitted to rank for dividend for that sum.

The company was incorporated in the year 1920 under the name of The Amalgamated Paper Mills, Ld., which in the following year was changed to "The Associated Paper Mills, Ld." Of the company's articles of association only two need to be mentioned—namely, art. 27, which was as follows: "If any member fail to pay any call or money payable under the terms of allotment of a share on the day appointed for payment thereof, the Board may at any time, while the same remains unpaid, serve a notice on him requiring him to pay the same, together with any interest," etc., etc., and art. 31, which was as follows: "Any member whose shares have been forfeited shall, notwithstanding such forfeiture, be liable to pay to the company all calls or other moneys, interest, and expenses, whether presently payable or not, owing in respect of such shares at the time of forfeiture with interest thereon

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from the time of forfeiture, until payment at the rate of 10 per cent. per annum or such less rate as may be fixed by the Board."

The facts were stated in the judgment of the Court as follows: "The claim in respect of which the proof was lodged arises under a guarantee dated December 29, 1920, which was signed by the bankrupts, amongst others, and is as follows: 'To the Amalgamated Paper Mills, Ld. In consideration of your entering into the two agreements which have recently been prepared under which Henry & Leigh Slater, Ld., are expressed to agree to forthwith convey, deliver and make over to you the whole of the assets and property of Henry & Leigh Slater, Ld., except as in the said agreements mentioned, and you are expressed to agree to pay that company 60,000*l.* and also guarantee to them the payment of the sum of 60,750*l.* 3*s.* We hereby guarantee to you the payment on one month's notice in writing of all instalments now owing to you upon the shares the numbers of which are set out in the first part of the schedule hereto, whether such shares remain registered in the name of the present holder or holders thereof, the intention being that this guarantee shall run with the shares until the same are fully paid. Provided always that no one of us shall be bound to pay you more in the whole than the sum set opposite to his name in the second part of the said schedule, each one being deemed discharged from liability hereunder when he has paid you that sum.' The sum set opposite the bankrupts' name is the sum of 63,301*l.* 10*s.*, for which the company now seek to prove in the bankruptcy. At the date when this guarantee was signed, the shares in respect of which it was given had been paid up to the extent of 10*s.* per share, and a further sum of 10*s.* was due under the terms of the allotment of the shares. The ground for the rejection by the trustee of the proof, was that the guarantors had been released from liability by reason of the subsequent acts of the company. What happened was that the shareholders did not pay their calls, and on January 14, 1921, a notice has served by the company on the shareholders as follows: 'Please take notice

in accordance with arts. 27 and 28 of the articles of association that the company hereby requires you to pay to them at the above mentioned registered office of the company on or before February 15, 1921, the sum of £ (blank) being the final instalment of 10*s.* per share payable on October 1, 1920, under the terms of allotment to you of (blank) ordinary shares of the company together with interest that has accrued thereon at the rate of 10 per cent. per annum and a proportion of the expenses that have been incurred by the company by reason of the non-payment of such instalment at its due date. Please also take notice that in the event of non-payment of the said sum of £ (blank) together with the interest and expenses found to be due as aforesaid on or before the day and at the place hereby appointed, the share or shares in respect of which such payment is due will be liable to be forfeited. Dated this 14th day of January, 1921.' The company also sent to each of the guarantors, including the two bankrupts, a notice dated January 17, 1921, in the following terms: 'The Amalgamated Paper Mills, Ld. Dear Sirs, I beg to advise you that acting under instructions received from my directors, I have sent notices by registered post to the shareholders whose final instalment of 10*s.* per share is in arrear, requiring them to pay on or before the 15th February next, in accordance with the provisions of arts. 27 and 28 of the articles of association, all moneys found to be due and owing to the company in respect of the shares allotted to them. Please take notice that if default is made by the shareholders whose names are set out in part 1 of the schedule referred to in your guarantee to the company dated December 29, 1920, in complying with the terms of the said notice, you and each of you are required by the directors to pay to them at the above address on or before 17th February next the amounts set opposite your respective names in part 2 of the said schedule annexed to the aforesaid guarantee. For your guidance I reproduce below the amounts of your respective liability.' That is signed by the secretary of the company. The next thing that happened was that neither the shareholders nor

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the guarantors having paid the instalment of 10*s.* per share so called up, the company on April 21, 1921, passed resolutions to forfeit the bulk of the shares contained in the first part of the schedule of the guarantee—namely, 175,853 of those shares. Later on, in June of 1921, a further eight shares were forfeited by the company, and on August 29, 1922, 10,000 further shares were forfeited, making in all 185,861 shares so forfeited.

On January 8, 1925, the company resolved on a reduction of capital and a sub-division of shares. In the resolutions carrying out that reduction and sub-division, the shares in question are kept apart and are treated as shares unissued upon which nothing has been paid up. The sub-division reduced the nominal amounts of the shares from one share of 1*l.* each to twenty shares of 1*s.* each. The next date is the bankruptcy of the guarantors. The receiving order against them was made on September 9, 1925, and it is not material for the purpose of this case to ascertain the date of the commencement of the bankruptcy. As already stated, on April 10, 1926, the applicants lodged their proof with the trustee in which they claimed the sum already mentioned under the guarantee."

Owen Thompson K.C. and *E. W. Hansell* for the company.

H. St. John Field for the trustee in bankruptcy of the guarantors, the respondent. The company is not entitled to prove in the bankruptcy. It is well settled that any alteration, unless ex facie unsubstantial, affecting the original contract made by the principals, without the consent of the sureties, will discharge the sureties: *Holme* v. *Brunskill* (1); *Egbert* v. *National Crown Bank* (2); *Giddens* v. *Dodd.* (3) By exercising their option to forfeit the shares and by force of art. 31, the company voluntarily substituted a new liability in place of the original liability under the contract of suretyship, and it was in respect of such latter liability only that the guarantors entered into the contract: *Stocken's Case.* (4)

(1) (1877) 3 Q. B. D. 495.
(2) [1918] A. C. 903, 908.
(3) (1856) 3 Drew, 485.
(4) L. R. 3 Ch. 412.

The forfeiture of the shares involved the extinction of the liability under the contract of suretyship, which extended only to calls owing in respect of the forfeited shares at the date of the contract. Upon forfeiture the guarantors became liable to the company as debtors under the provisions of art. 31, and not as contributories: *Ladies' Dress Association* v. *Pulbrook*. (1) It is impossible for the company to maintain that the guaranty runs with the shares after their forfeiture. The only meaning of that provision in the contract is that the guaranty was to continue after the shares had been transferred. The guaranty was to continue so long as there existed a holder of the shares in respect of which the guaranty was given. Further, the company by reducing the capital of the company and sub-dividing the shares altered the position of the guarantors: *In re Great Western Steamship Co.* (2); *In re American Pastoral Co.* (3); *In re International Conversion Trust*. (4) The guarantors are entitled to be protected by the company, as the principal creditors, whose duty it was to have preserved the security; and the company having voluntarily forfeited the shares, thereby discharged the sureties: *Pledge* v. *Buss*. (5) Any interference with the rights of the surety will effect his discharge: *Polak* v. *Everett* (6); *Campbell* v. *Rothwell* (7); and *Hewison* v. *Ricketts*. (8) The company by their voluntary act and without the consent of the sureties deprived them of the equitable right of lien against the shares which was theirs by way of indemnity against any payment they might be called upon to make under their contract of suretyship.

Owen Thompson K.C. in reply. The general principle is not disputed, that the surety is entitled to stand by the original contract, which may not be altered without his consent. That principle has not been infringed in the present case. In *In re Denton's Estate* (9) the objection was not taken that, the security having gone, the surety was discharged.

(1) [1900] 2 Q. B. 376.
(2) (1886) 35 W. R. 154.
(3) (1890) 62 L. T. 625.
(4) [1892] W. N. 100.
(5) (1860) Johns. 663.
(6) 1 Q. B. D. 669.
(7) (1877) 47 L. J. (Q. B.) 144.
(8) (1894) 63 L. J. (Q. B.) 711.
(9) [1904] 2 Ch. 178.

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Here the liability of the guarantors crystallized on February 17, 1925. The shares became forfeited through the default of the guarantors in paying the instalments then due on the shares which they were under an obligation to pay according to their contract. That differentiates the present from the cases cited. The guaranty did not here depend upon the continued existence of the shares. The guarantors had notice of the liability of the shares to forfeiture; a liability which was part of the original contract. It was within the option of the guarantors to intervene and prevent a forfeiture. Under art. 31 the liability to pay continued notwithstanding the forfeiture; and the instalments due on the shares could be sued for as debts due to the applicants. Whether the guarantors were liable to pay those instalments in the capacity of debtors or of contributories matters not; under art. 31 no new liability was created, the original liability was saved: the liability remained after the forfeiture a liability to pay the calls on those shares: see per Romer L.J. in *Ladies' Dress Association* v. *Pulbrook* (1); *Stocken's Case.* (2) The contractural relation between the parties has not been altered; the guarantors by standing by and allowing the shares to be forfeited remained liable under their contract to pay the calls. Their contractual liability to pay is not affected by the disappearance of the shares as a security: it was owing to their own default that they lost the security of the shares.

LAWRENCE J. [after stating the facts as above set out, proceeded as follows:] Although I have stated the facts following the forfeiture of the shares, in my judgment the case really turns upon the effect of the forfeiture; and the question to be determined is whether the forfeiture operated to discharge the liability of the guarantors under the guaranty. The underlying principle governing the decision in this case is not really in dispute. The difficulty lies in the application of that principle to the facts which I have stated. Two well known cases have been cited as stating the principle—

(1) [1900] 2 Q. B. 381. (2) L. R. 3 Ch. 412.

namely, *Polak* v. *Everett* (1) and *Holme* v. *Brunskill*. (2) In both those cases there had been an alteration in the original contract the performance of which was guaranteed by a subsequent agreement between the principal creditor and the principal debtor. In the latter case Cotton L.J., in a passage which is often referred to and has been expressly approved in the Privy Council in the recent case of *Egbert* v. *National Crown Bank* (3), states the principle as follows: "The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court, will not, in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question, whether the surety is discharged or not, to be determined by the finding of a jury as to the materiality of the alteration or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged."

It is contended by Mr. Owen Thompson that, as that statement has reference to the case where there has been an agreement between the principals, it has no application to the present case, where there has been no such agreement. Although Cotton L.J. refers to the rule as being one where there has been an agreement between the principals, I feel confident that the learned Lord Justice did not intend in any way to affect or negative the proposition that, where the creditor takes upon himself (although without agreement between himself and the principal debtor) to alter the rights

(1) 1 Q. B. D. 669. (2) 3 Q. B. D. 495, 505.
(3) [1918] A. C. 903.

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of the parties so as to interfere with the arrangements between the surety and the principal debtor, such an alteration would have the effect of releasing the surety. In *Polak* v. *Everett* (1) the Court of Appeal considered the principles upon which the rule was founded, and, in my judgment, those principles cover the case where the rights of a surety are interfered with at the instance of the creditor, although without agreement between himself and the principal debtor. Blackburn J. says (2) that the reason for the rule that where the creditor gives time to the principal debtor the surety is discharged is, "because the creditor, by so giving time to the principal, has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not, and because he in fact cannot have the same remedy against the principal as he would have had under the original contract"; and he states the principle as being that, "as it is very undesirable that there should be any dispute or controversy about whether it is for his benefit or not, there shall be the broad principle, that if the creditor does intentionally violate any rights the surety had when he entered into the suretyship, even though the damage be nominal only, he shall forfeit the whole remedy." He points out that in the case he is considering, although the interference with the rights of the surety was not by giving time to the debtor, yet it was equally as great an interference. The surety had in that case at the time he entered into the suretyship a right to have certain book debts appropriated to reduce the principal debt, and that right he had been deprived of by the act of the creditor in releasing the book debts. Further on (3) in his judgment the same learned judge states the rule as follows: "Where the creditor wilfully interferes with the rights of the surety and alters the equitable rights which he had acquired, alters them, even though it may be for the surety's benefit—without the surety's assent, the surety is discharged." Mellor J. puts the point in this way (4): "The surety is entitled not to be affected by

(1) 1 Q. B. D. 669.
(2) Ibid. 674.
(3) 1 Q. B. D. 675.
(4) Ibid. 676, 677.

anything done by the creditor," and then a little later, "The surety is entitled to remain in the position in which he was at the time when the contract was entered into." Quain J. says (1), quoting Lord Loughborough in *Rees* v. *Berrington* (2): "It is the clearest and most evident equity not to carry on any transaction without the privity of him who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him. You must let him judge whether he will give that indulgence contrary to the nature of his engagement." "These"—continued Quain J.—"appear to me to be the principles that govern the case here. Without the surety's consent the creditor here has disposed of these book debts in an entirely different manner to that in which it was intended they should be applied under the original contract. I agree with my Brother Mellor that it is a thoroughly sound and safe principle that, where the act is voluntary and deliberate, the creditor, altering the contract and rendering it impossible that it should be carried out in its original form, should suffer."

The question, having regard to the principle thus stated, is whether in this case the company have so interfered with the rights of the sureties existing at the date of their entering into the suretyship as to discharge them. It has been contended that the forfeiture of the shares was such an interference, since it has affected the sureties in two ways: first, by determining the original contract between the creditor and the principal debtor and substituting a fresh and more onerous liability for the liability which theretofore subsisted under the original contract; and secondly, by taking away the equitable right of lien on the shares which the sureties would have had under their guarantee against the principal debtor, had the sureties paid the amount of the instalments in arrear.

In support of the submission that a new liability has been substituted for the original liability, reference has been made

(1) 1 Q. B. D. 677. (2) (1795) 2 Ves. Jun. 540.

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to art. 31 of the company's articles of association and to two cases—namely, *Stocken's Case* (1), and the *Ladies' Dress Association* v. *Pulbrook*. (2) In *Stocken's Case* (1) the articles of association provided that overdue calls were to carry interest and that the forfeiture of shares should involve the extinction at the time of forfeiture of all interest claims and demands in respect of the shares, but that the shareholders should, notwithstanding, be liable to pay the company all calls owing on such shares at the time of such forfeiture, and it was held that a member whose shares had been forfeited for non-payment of calls was liable to pay the call, but not any interest upon them. In deciding that case Lord Cairns said (3): "The following part of the 50th clause shews that the construction which I have put upon the first part is the construction put on it by the framer of the articles; for he evidently thought that if he stopped there any right to proceed for calls would be gone, and he therefore introduces a provision which seems to me to be in substance and in words the creation of a new right. The words are these: 'but any member whose shares have been forfeited shall notwithstanding be liable to pay to the company'—what? He is not to be liable for anything for which this clause does not say he is to be liable, and what it is said he is to be liable for is this: 'to pay to the company all calls owing on the shares at the time of such forfeiture';—not saying a word as to interest." This case shows that in Lord Cairns' judgment the article (which corresponded with art. 31 in the present case) provided in words and in substance for the creation of a new right in the company against their shareholders. In the *Ladies' Dress Association* v. *Pulbrook* (2) the question arose whether the former owner of shares which had been forfeited on account of non-payment of calls was liable to pay the same, in view of the liquidation of the company having taken place more than a year after the forfeiture and of the action having been brought after the liquidation, and it was held that, under the provisions of s. 38

(1) L. R. 3 Ch. 412. (2) [1900] 2 Q. B. 376.
(3) L. R. 3 Ch. 415.

of the Companies Act of 1862, the action was maintainable, inasmuch as the defendant was liable not as a contributory, but as a debtor to the company. Romer L.J. in that case (1) says: "It is clear that a person in the position of the defendant is liable with regard to unpaid calls, not as a contributory, either as a present or a past member of the company, but as a debtor to the company under the provisions of the articles of association." He states that this was pointed out as long ago as 1867 by the Master of the Rolls in *Needham's Case.* (2)

Now that case shows this, that not only is the right created by art. 31 a new right in accordance with *Stocken's Case* (3), but further that such right imposes a more onerous obligation on the shareholder than if the shares had not been forfeited, in that, although he would have escaped liability as a contributory, because he had ceased to be a member for upwards of a year, yet, the shares having been forfeited, his liability to an action remained, and in the winding up he was made to pay the amount of the calls. In my opinion, on the authority of those two cases, the forfeiture was an interference with the rights of the sureties as against the principal debtor coming within the principle laid down in *Polak* v. *Everett.* (4)

As regards the second point, it is clear that after the forfeiture the bankrupts were in a worse position than they had been at the date when they entered into the suretyship. At that date had they been called upon to pay, as indeed they were, they had a lien upon the shares as against the principal debtors. The forfeiture took away that line, and to that extent interfered with their rights and placed them in a less favourable position. It seems to me therefore that under both heads the applicants have by the forfeiture prejudicially affected the position of the sureties without obtaining their assent. Mr. Owen Thompson further contended that as the forfeiture was a natural result flowing from the original contract for the shares the guarantors are not discharged by the forfeiture. In my opinion the answer

(1) [1900] 2 Q. B. 381.
(2) (1867) L. R. 4 Eq. 135.
(3) L. R. 3 Ch. 412.
(4) 1 Q. B. D. 669.

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to that contention is, that it does not follow, because the company had the power and the right to forfeit the shares, that it could take that step without releasing the guarantors. It had the option either to compel the sureties to pay, in which case the sureties would have had a lien on the shares, or to forfeit the shares and make them its own, in which case the rights of the sureties were interfered with and they were discharged.

For the reasons stated I have come to the conclusion that the decision of the trustee in rejecting the proof was right, and that this application fails and must be dismissed with costs.

Solicitors: *Charles Russell & Co., for Skelton & Co., Manchester; Goldbergs.*

H. C. H.

TOMLIN J. 1926 *July* 28.

In re MUIR'S PATENT.

[1925. M. 3327.]

Patent — Prolongation — Preliminary Point—Extension of Term granted on Petition—Application by Originating Summons for second Extension of Patent—"Losses due to hostilities"—Change of Circumstances not foreseen—Jurisdiction of Court to grant further Extension—Effect of new Act—New Grounds alleged—Patents and Designs Act, 1907 (7 *Edw.* 7, *c.* 29), *s.* 18—*Patents and Designs Act,* 1919 (9 *& 10 Geo.* 5, *c.* 80), *s.* 7, *sub-s.* 3.

A patentee having been granted in 1919 (prior to the coming into force of the Patents and Designs Act, 1919) an extension of his patent for seven years under s. 18 of the Patents and Designs Act, 1907, on the ground of inadequate remuneration, applied on the expiration of such extension by originating summons under s. 7, sub-s. 3, of the Patents and Designs Act, 1919 (being an additional sub-section to s. 18 of the Act of 1907), for a further extension of ten years on the ground of heavy unforeseen losses or damage therewith suffered by reason of hostilities:—

Held, that the patentee having been granted an extension under the original s. 18 of the Patents and Designs Act, 1907, there was no jurisdiction under the amended sub-s. 6 (s. 7, sub-s. 3, of the Act of 1919) by which the Court could entertain a second application, even where the ground alleged for the application is loss by reason of hostilities. The Court had no separate independent jurisdiction under the new sub-section, which was merely a modification of an existing jurisdiction

and only in the nature of an instruction in relation to procedure. Such an application therefore could not be granted.

The principles of *In re Thompson's Patent* [1909] 2 Ch. 447 followed.

ADJOURNED SUMMONS.

The applicant, John Muir, of Beith, Scotland, was the registered owner of a patent No. 8957 of 1905 for an invention for use in the wheels of vehicles, particularly heavy motor vehicles, for reducing the shocks and injury caused by irregularities in the road; and thereby also reducing the wear to the roads. The original patent expired on April 28, 1919, and the applicant applied by petition for an extension. The matter came before Sargant J., who by an order dated November 13, 1919, granted a further extension for seven years, the learned judge in the course of his judgment stating that in his view the whole period of the war ought to be written off from consideration. The new letters patent were granted and sealed as of April 28, 1919, and the term having expired on April 28, 1926, the applicant, J. Muir, took out an originating summons under the Patents and Designs Act, 1907, s. 18 (1), as amended by the Patents and Designs Act, 1919, s. 7 (2), for an order that the term of the

(1) Patents and Designs Act, 1907, s. 18:—

"(1.) A patentee may, after advertising in manner provided by rules of the Supreme Court his intention to do so, present a petition to the Court praying that his patent may be extended for a further term, but such petition must be presented at least six months before the time limited for the expiration of the patent.

(2.) Any person may give notice to the Court of objection to the extension.

(4.) The Court, in considering its decision, shall have regard to the nature and merits of the invention in relation to the public, to the profits made by the patentee as such, and to all the circumstances of the case.

(5.) If it appears to the Court that the patentee has been inadequately remunerated by his patent, the Court may by order extend the term of the patent for a further term not exceeding seven, or, in exceptional cases, fourteen years, or may order the grant of a new patent for such term as may be specified in the order and containing any restriction, conditions and provisions the Court may think fit."

(2) Patents and Designs Act, 1919, s. 7:—

"(1.) At the end of sub-s. 1 of s. 18 of the principal Act [Patents and Designs Act, 1907], which relates to the extension of the term of a patent, the following proviso shall be inserted: 'Provided that the Court may in its discretion extend such period within which such a petition may be presented.'

(2.) In sub-s. 5 of the same section, for the words 'for a further

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patent might be extended for a further term of ten years or for such other term as the Court might think fit, or alternatively for the grant of a new patent.

The applicant in his affidavit alleged that since the order of Sargant J. he had done his best to further the invention, having spent a considerable sum of money in connection therewith. He had, however, incurred considerable losses, and in consequence asked that an extension should under the circumstances be granted. He also alleged that at the time of the order he had anticipated that on the termination of the war he would have had an opportunity of realizing the results of his expenditure, but that owing to the large number of Government vehicles at that time thrown on the market, many manufacturers of heavy motor vehicles had to go into liquidation, and that these circumstances had seriously impeded the development of his invention and rendered its success commercially impossible.

Gavin Simonds K.C. and *E. W. Cox-Sinclair* for the applicant. The applicant seeks for an extension of his patent under the Act of 1919, on the ground of unforeseen losses since 1919 and due to hostilities arising from the war.

The real point is whether the Court can in this case grant a second extension by virtue of s. 7, sub-s. 3, of the Act of

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term not exceeding seven years, or, in exceptional cases, fourteen years,' there shall be substituted the words 'for a further term not exceeding five years, or, in exceptional cases, ten years.'

(3.) At the end of the same section, the following sub-section shall be added:—

(6.) Where, by reason of hostilities between His Majesty and any foreign state, the patentee as such has suffered loss or damage (including loss of opportunity of dealing in or developing his invention owing to his having been engaged in work of national importance connected with such hostilities) an application under this section may be made by originating summons instead of by petition, and the Court in considering its decision may have regard solely to the loss or damage so suffered by the patentee:

Provided that this sub-section shall not apply if the patentee is a subject of such foreign state as aforesaid, or is a company the business whereof is managed or controlled by such subjects or is carried on wholly or mainly for the benefit or on behalf of such subjects, notwithstanding that the company may be registered within His Majesty's Dominions."

1919, which is an additional sub-section to s. 18 of the Act of 1907. Was not the Act of 1919 designed to meet an unprecedented situation, that is one where an applicant has suffered losses due to the war? Here the circumstances are quite different to those which could arise under the Act of 1907. In this new sub-section you get provision for a person who cannot get an extension under the law previously existing. It is for the applicant to show that he comes within the new addition to the Act of 1907. It is submitted that Sargant J., when granting the extension in 1919, did not appreciate the circumstances as they afterwards became. The effect of the new s. 7 of the Act of 1919 was stated by the learned judge and the Court of Appeal in *In re Davidson's Patents.* (1) It is an addition to the section in the 1907 Act. In so far as the 1907 Act is concerned, *In re Thompson's Patent* (2) undoubtedly is a binding authority, but there is great divergence in the words of the later statute and a clear line of demarcation between the Acts; therefore *In re Thompson's Patent* (2) should not apply. The 1919 Act is for the benefit of a limited class of persons within a later period. The 1919 statute was really in the nature of an emergency provision, to cover a transitional period.

[TOMLIN J. Do you say that sub-s. 6 of s. 18 of the Act of 1907, that is the sub-section added by s. 7 of the 1919 Act, gives new and independent relief?]

It is submitted, yes. If one looks at sub-s. 2, take the words "further term," is it necessarily the original term? The later Act was designed to meet a different set of circumstances.

Dighton Pollock for the Comptroller General. This application is merely the asking for an extension of an existing patent. *In re Thompson's Patent* (2) applies and is binding. The matter was conclusively dealt with by Sargant J. in 1919: see the case reported under *In re Muir's Patent* (3); also see *In re Davidson's Patents* (4); *In re Brown's Patent.* (5)

(1) [1921] 1 Ch. 69, 74, 82.
(2) [1909] 2 Ch. 447.
(3) (1919) 36 R. P. C. 327.
(4) [1921] 1 Ch. 69.
(5) (1920) 37 R. P. C. 52, 55.

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There has already been granted the patentee an extension for loss, and he cannot under the Act of 1919 come again in respect of losses arising in connection with the same patent and get a second extension.

Gavin Simonds K.C. in reply.

TOMLIN J. This is an application by originating summons under s. 18, sub-s. 6, of the Patents and Designs Act, 1907, as amended by the Act of 1919, for relief by way of extension of the patent on the ground of loss or damage suffered by reason of hostilities.

This application raises a point which is unusual and which has to be dealt with as a preliminary point, because, if the objection taken by the Crown to the application is well founded, I have no jurisdiction to entertain it and am therefore not in a position to consider it on its merits.

The point is this: The applicant is a patentee under letters patent granted in 1905. Those letters patent expired in the ordinary course in 1919, before the Act of 1919 came into force. The subject-matter of the letters patent is an invention of great ingenuity, and the merits of it were recognized by Sargant J. upon an application to which I am going to refer. In 1919, after the expiry of the patent but before the Act of 1919 came into force, Sargant J. heard and adjudicated upon an application by petition by the present applicant under s. 18 of the Act of 1907, asking for an extension of the patent on the ground indicated in sub-s. 5 of that section—namely, that he had been inadequately remunerated. Sargant J., in dealing with the case, expressed the view that the patent was a patent of great ingenuity and utility, and that, in all the circumstances of the case, the patentee had not been adequately remunerated; and having regard to those circumstances he allowed an extension of seven years. That was the full amount then admissible for an extension, unless in exceptional cases. The result was that effect was given to that judgment by a re-grant, or a grant of a further term in the form normal and proper for a case where the original term of the patent had expired. It was hoped, no

doubt, by the patentee and by the learned judge, who acceded to his application, that those seven years would afford him an opportunity of remunerating himself adequately for his work and ingenuity.

It appears, however, that the circumstances of the times since 1919 have been such that the inventor's anticipations have not been realized, and that there has not been, as was hoped, the opportunity of remuneration. In those circumstances, at the expiration of the seven years, or near the expiration of the seven years, he makes a second application to the Court under sub-s. 6 of the amended section, asking that he may have a further extension by reason of the loss or damage suffered as the result of hostilities.

The point which I have to determine first of all is whether, upon s. 18 of the Act of 1907, as amended by the Act of 1919, a second application for an extension, being an application to extend on the ground of loss by reason of hostilities, is admissible at all and can be entertained. It is plain that, under the original s. 18 of the Act of 1907, there was no jurisdiction to entertain a second application for a second extension. The jurisdiction of the Court to extend a patent was exhausted by one application. It is past hope to suggest now that I can take any other view of the original section. It was determined by Parker J. in *In re Thompson's Patent* (1), following the decision of the Privy Council in *In re Goucher's Patent* (2) on the earlier Acts, that that was the true construction of the section, and by that decision I am bound.

The only question, therefore, that can be open to-day is whether, having regard to the amendment in that section made by the Act of 1919, which is an amendment at any rate in regard to an application for extension to cover loss by reason of hostilities, it is admissible to apply to the Court, notwithstanding that there has already been an extension under the original jurisdiction conferred by s. 18.

Now it is to be observed that this provision in regard to damage, what I may call war loss, is introduced as a sub-section into s. 18. It is not introduced as an independent section

(1) [1909] 2 Ch. 447. (2) (1865) 2 Moo. P. C. (N. S.) 532.

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conferring upon the Court an independent jurisdiction. It is introduced as a sub-section of the existing section, as a modification of an existing jurisdiction. It will be remembered that under the section in its original form, a patentee may present a petition praying that his patent may be extended for a further term, and he has to present that petition at least six months before the time limited for the expiration of the patent. In considering the application, the Court under sub-s. 4 is bound to have regard to the nature and merits of the invention, in relation to the public, to the profits made by the patentee, as such, and to all the circumstances of the case; and under sub-s. 5, if it appears to the Court that the patentee has been inadequately remunerated by his patent, the Court may by order extend the term of the patent for a further term not exceeding seven years, or, in exceptional cases, fourteen years, or may order the grant of a new patent for such term as may be specified in the order, and containing such restrictive conditions and provisions as the Court may think fit. That is how the section originally stood. Then there comes an additional sub-section: "Where, by reason of hostilities between His Majesty and any foreign state, the patentee as such has suffered loss or damage (including loss of opportunity and so on)," an application under this section may be "made by originating summons instead of by petition." Pausing there for a moment, all that is said is that in a certain condition of facts an application under this section may be made by summons instead of petition; in other words, the procedure is altered—"and the Court in considering its decision"—now what decision? There is no decision which it is for the Court to give under sub-s. 6 at all, unless it be the decision under the section: "and the Court in considering its decision"—and it is of great importance to note that up to that phrase, "its decision," there has been no indication, apart from the rest of the section, as to what it is the Court is to decide—"may have regard solely to the loss or damage so suffered." It is quite plain that sub-s. 6 gives the Court no jurisdiction, no separate, independent jurisdiction, of any kind. Sub-s. 6 is only in

the nature of an instruction in relation to procedure, and an instruction to the Court how, in coming to its "decision" upon an application under s. 18 made in certain circumstances, it is to arrive at its conclusion, by taking into account certain matters solely. The sub-section concludes with a proviso which is not material for the purpose that we are now considering. Now can I say, with a sub-section introduced in that way as only a modification of what is to take place upon an application under the original section in a certain set of circumstances, that that has made such an alteration in the frame and effect of the section as really to displace the decision in *In re Thompson's Patent* (1) so far as an application under sub-s. 6 is concerned? It is true that the modification has introduced the power for the Court in its discretion to extend the period in which the petition may be presented, and the fact that the petition under the section as originally framed had to be presented within six months before the expiration of the patent, was one of the matters to which Parker J. called attention in his judgment in *In re Thompson's Patent.* (1) But it does not seem to me that the conferring of a discretion of that kind on the Court does anything to modify the original frame of the section. However much I may sympathize with the inventor, I am unable to come to the conclusion that there is by this section given to me any jurisdiction to entertain a second application, even where the ground alleged for the application is loss by reason of hostilities.

I only desire to add that, though the question of merits has not been dealt with, it seems to me prima facie at any rate almost impossible to suppose that, if I were free to entertain this application, I could come to any conclusion other than that the subject-matter which is to be considered under sub-s. 6 has already in this case been taken into account by Sargant J. in his decision in 1919, because the loss which is alleged here to-day must either be loss after 1919, which is not loss by reason of hostilities, or must be loss in connection with the events before 1919, which prima facie at any rate

(1) [1909] 2 Ch. 447.

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I must regard as having been considered and liquidated by the relief afforded in 1919. I am, of course, expressing only a prima facie view on that which has not been in fact discussed. I dismiss the summons on the ground that I have no jurisdiction to entertain it.

Solicitors: *Ravenscroft, Woodward & Co.; Solicitor to the Board of Trade.*

A. R. T.

C. A. 1926 LAWRENCE J. *June* 29. C. A. *July* 29.

FRAMPTON *v.* GILLISON.

[1926. F. 249.]

Vendor and Purchaser—Restrictive Covenant—Trading restricted to Chemistry and Druggist's Business and Dentist and Doctor—Carrying on Post Office in Addition to Chemist's Business—Construction of Covenant—Surrounding Circumstances—Post Office not "Trading" or Breach of Covenant.

The defendant, in addition to the business of a chemist and druggist carried on by him in one out of a row of shops, also carried on upon the same premises a sub-post office, having been duly appointed sub-postmaster by the Postmaster-General. He had bought the shop subject to a covenant that "trading upon the land shall be restricted to chemistry and druggist's business and dentist or doctor," and the object of the plaintiff in imposing restrictions upon each purchaser of a shop was to prevent competing businesses being carried on and also to give each purchaser the monopoly of a particular trade so far as the row of shops was concerned. On motion by the plaintiff for an injunction:—

Held, by the Court of Appeal, that in construing the meaning and effect of such a restriction, the surrounding circumstances and the reason and object of the covenantee in requiring such a covenant must be taken into consideration, and that so construing it, the defendant, as sub-postmaster, was not "trading," or committing a breach of the covenant.

Decision of Lawrence J. affirmed.

MOTION.

By a memorandum of agreement dated August 13, 1925, the plaintiff, Alfred Frampton, agreed to sell to the defendant, James Allan Gillison, who was a medical practitioner, for the sum of 3150*l.*, a freehold shop, being part of the Bromley Hill Estate, in the county of Kent, known as No. 10 Bromley

Hill, Lewisham; September 1, 1925, being the date fixed for the completion of the purchase. The agreement contained the following words: "Trading to be restricted to chemistry and druggist's business and dentist or doctor."

The defendant purchased the shop with a view to transferring it to a company which he was about to form for the purpose of carrying on a chemist's and druggist's business, which company was on November 26, 1925, incorporated under the style of "Sterling & Sons, Ld.," and of which the defendant became one of the directors.

In the same month, in spite of the plaintiff's refusal to allow the defendant to open and conduct a post office upon the purchased premises, the defendant was appointed by the Postmaster-General sub-postmaster of an office to be opened on the premises, and accordingly in December, 1925, he took possession of the premises, opened an office, and proceeded to carry on there the work of a sub-postmaster as well as the business of a chemist and druggist.

By a letter dated December 21, 1925, the plaintiff's solicitors wrote to the defendant's solicitors as follows: "10 Bromley Hill. Our client informs us that he has allowed your clients to take possession of the above premises pending completion, but he finds that they have arranged, among other things, to carry on a post office there. The contract herein specifically provides that the trade carried on upon the premises is to be restricted to chemists and druggists, dentist or doctor, and a post office is clearly outside this restriction. As our client will probably be arranging for a post office in one of the other shops, we must ask you to get your client to immediately discontinue the postal business on the above premises."

On March 19, 1926, the premises were conveyed to the defendant by a deed which contained a covenant by the company in the following words: "And Sterling & Sons, Ld., hereby covenant with Albert Frampton that trading upon the land shall be restricted to chemistry and druggist's business and dentist or doctor."

This was a motion (which had stood adjourned from February 26, 1926, in order that a conveyance with the

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appropriate covenant contained in it might in the meanwhile be executed and that the company might be added as defendant and respondent) for an injunction to restrain the defendants from using the premises as or for the purpose of a post office and from carrying on upon the premises any trade other than that of a chemist, druggist, dentist or doctor.

It appeared from the evidence that the premises which the defendant Gillison purchased formed part of a row of shops which the plaintiff was in the course of building and disposing of and, in order to prevent two or more businesses of the same kind from being carried on in competition, his scheme was to require any purchaser from him to enter into a covenant restricting trading upon premises to certain trades or businesses therein specifically mentioned. It also appeared that the remuneration of a sub-postmaster is determined by a scale of payments by which the amounts are regulated in proportion to the amount of business done at the office and by a cost of living bonus fluctuating with the cost of living.

The motion was heard before Lawrence J. on June 29, 1926.

Jenkins K.C. and *Gilbert Beyfus* for the plaintiff. The restriction against trading extends to a chemist's and druggist's "business." The word "trading" in this covenant is used in the wide sense as including a business or profession. What is prohibited is not merely trading in the sense of buying and selling chattels, but the carrying on of any business or profession other than those businesses and professions specifically excepted. The defendant, in carrying on a post office, besides selling postcards and stamped envelopes, carries on the business of a carrier of letters and parcels. Moreover the business or profession of a dentist or doctor may involve the sale of certain articles, in the case of a doctor of medicines. In *Chartered Mercantile Bank of India, &c.* v. *Wilson* (1) the majority of the Court refused to restrict the meaning of the word "trade" to the buying and selling of chattels, and held

(1) (1877) 3 Ex. D. 108.

that a telegraph business was a trade within the meaning of an Act, 57 Geo. 3, c. 25, which had, amongst other objects, to exempt certain dwelling-houses employed for the sole purpose of trade or of lodging goods from certain duties. In *Doe* v. *Bird* (1) the carrying on of the business of a lunatic asylum was held not to be a trade within the meaning of a covenant against using or exercising the trades or businesses of a butcher, etc., or any offensive trade; but there the covenant was only applicable to the business of buying and selling, because the trades or businesses expressly prohibited were conducted by buying and selling. The element of competition here is not wanting, because the covenant was taken by the plaintiff for his own personal benefit, to protect his adjoining property.

[They also referred to *Wadham* v. *Postmaster-General*. (2)]

F. R. Evershed for the defendant. The defendant is not trading in the ordinary sense of the term, even assuming that the word here includes the business of a carrier. He is a subordinate officer of the Postmaster-General, who represents the Government in carrying on the work of a post office. The object of the covenant is to prevent competition between trades or businesses of the same kind being carried on in the same row of shops, but there can be no competition between employees of the Government: the Government has a monopoly of the sale of stamps and the carriage of letters and parcels. The defendant is engaged in a branch of the public service and is not trading. In *Bainbridge* v. *Postmaster-General* (3) Collins M.R. referred with approval to the judgment of Lord Mansfield in *Whitfield* v. *Lord Le Despencer* (4), and said: "Lord Mansfield says: 'The Postmaster has no hire, enters into no contract, carries on no merchandise or commerce. But the Post Office is a branch of revenue, and a branch of police, created by Act of Parliament. As a branch of revenue, there are great receipts; but there is likewise a great surplus of benefit and advantage to the public, arising from the fund. As a branch of police, it puts

(1) (1834) 2 Ad. & E. 161.
(2) (1871) L. R. 6 Q. B. 644.
(3) [1906] 1 K. B. 178, 188.
(4) (1778) 2 Cowp. 754, 764.

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the whole correspondence of the Kingdom . . . . under Government, and entrusts the management and direction of it to the Crown, and officers appointed by the Crown. There is no analogy therefore between the case of the Postmaster and a common carrier.'"

Jenkins K.C. in reply. In *Bainbridge* v. *Postmaster-General* (1) the sole question was whether the Postmaster-General was liable for the wrongful acts of his agent in carrying on the telegraph business: it only decided the limits of the liability of a Government official.

LAWRENCE J. This motion is brought to enforce a restrictive covenant which, though couched in a few simple words, in my opinion gives rise to considerable difficulty.

The covenant is by Sterling & Sons, Ld., who are the purchasers named in the conveyance, with Albert Frampton, the vendor, that trading upon the land shall be restricted to a chemist's and druggist's business or that of a dentist or doctor. [His Lordship then stated the other material facts and continued:] Having now to construe the covenant, it is necessary for me to consider the meaning of the words "trading upon the land." The word "trade" is an elastic term, and it would be inadvisable to attempt any general definition. According to the context in which it occurs, it may bear a very restricted meaning; on the other hand, it may bear a very wide one. There are, no doubt, many cases in which the word "trade" is used to denote every employment, manual or mercantile, as distinct from the liberal arts or learned professions. For instance, in the term "trade union" it includes the manual employment of the labourer. In the present case the trading contemplated by the covenant is to be restricted, amongst other things, to the occupations of a dentist and of a doctor, neither of which is a trade in the ordinary acceptation of the term. Mr. Evershed on behalf of the defendants is content to accept the widest possible signification of the term "trading," so as to include every employment, manual or mercantile, as opposed to the liberal

(1) [1906] 1 K. B. 178, 188.

arts and learned professions. The real question to be decided, however, is, granted that the word bears such a wide interpretation, whether the work of a sub-postmaster falls within it. It is necessary to consider, first of all, the position which a sub-postmaster occupies. Mr. Jenkins contended that the business carried on by the Postmaster-General, both at the General Post Office and at all sub-post offices, is akin to the business of a carrier and of an ordinary tradesman occupied in buying and selling. He points out that the Postmaster-General buys materials (such as paper, envelopes and post-cards) and sells them to the public at a profit; he also carries on what, in the hands of a private individual, would be the business of a carrier. If you could disregard the position which the Postmaster-General occupies, the business which the defendant carries on as his subordinate would, I think, undoubtedly constitute a breach of the covenant. But, in my opinion, the argument of Mr. Evershed that this so-called trading is really a branch of the public service and is altogether outside the purview of the covenant is sound. The defendant is appointed by the Postmaster-General as his subordinate to carry on the work of a sub-post office on the premises. The post office is a branch of the revenue of this country; it has a monopoly in the sale of stamps and in transacting other work, such as the carriage and delivery of letters, the granting of licences, etc., and, therefore, it is carrying on a business which in no sense can be said to be competing with any private individual.

Bearing in mind the surrounding circumstances, it would, in my opinion, be unduly stretching the language of the covenant to include the work of a sub-postmaster in the expression of "trading upon the land." It seems to me evident that the covenant in question and all similar covenants in the case of the adjoining premises were imposed for the purpose of preserving to the vendor the power more beneficially to dispose of the property which still remained in him, and also to enable him to confer upon prospective purchasers from him the benefit of any covenant which he had exacted from previous purchasers. It must be remembered that the

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Postmaster-General (and not the plaintiff) is the only person who can confer upon the defendant the right to carry on the business complained of on the premises in question. The plaintiff no doubt desires to leave the field open for a purchaser of one of the other shops who contemplates carrying on a stationery business, because he naturally thinks that in such a case the power to carry on in the shop the work of a post office in addition to the business of a stationer will prove to be an attraction to a possible purchaser. But I do not think that this is a sufficient reason for extending the meaning of the term "trading" in this covenant, so as to exclude the work of a post office.

On the whole, therefore, I have come to the conclusion, both on the ground that the sub-post office is a branch of the public service and on the ground of the monopoly enjoyed by the Postmaster-General, that the acts complained of in this action are outside the purview of the covenant and that the motion fails and must be dismissed. The costs will be the defendant's in any event.

H. C. H.

C. A.

The plaintiff appealed. The appeal was heard on July 29, 1926.

Gilbert Beyfus, for the appellant, addressed arguments to the Court similar to those put forward on behalf of the plaintiff in the Court below.

Owen Thompson K.C. and *F. R. Evershed* for the respondent were not called upon.

LORD HANWORTH M.R. stated the facts and read the words of the agreement for sale and the covenant restricting the trading on the property, and continued: Before the completion of the purchase the defendant made it known to the plaintiff that he was trying to obtain the appointment of sub-postmaster, and that he meant to carry on the business of a sub-postmaster on the premises—I use the word "business" on purpose. The defendant has now been

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appointed sub-postmaster and is carrying on upon these premises the business of a sub-postmaster. It is said that by so doing he has broken the covenant.

Lawrence J., to whom an application was made for an interim injunction, after reading the covenant, pointed out that it was quite clear that it was not the intention of the plaintiff to have competing businesses carried on in this row of shops; but I also agree with the learned judge that it is necessary, when considering the meaning of a restrictive covenant, to look at the surrounding circumstances and the nature of the property. Now looking at the covenant from that right perspective, the learned judge was quite correct in saying that the duties of the defendant are altogether outside the covenant. As sub-postmaster he is the servant of the Postmaster-General, and he has duties which are well defined, duties which now mainly concern old age pensions, savings certificates and such like, and which add very largely to the business of the sale of postage stamps, postcards, etc., and the despatch of letters. But whatever be his duties, it appears to be a stretching of words to say that he is "trading" on this land.

I think that Lawrence J. was right in saying that a sub-postmaster was a subordinate to the Postmaster-General. He is appointed on definite terms and his remuneration depends on a defined scale, and he cannot alter the price of anything he sells or charge any other price than that specified by the Postmaster-General. Nor can he increase his remuneration by excess of zeal. Mr. Beyfus has suggested a comparison with other similar offices, for instance the receiving office for a railway. Before I dealt with that I should like to consider much more carefully what was the business carried on by such an agency, but I decline to do that. Here we have to consider that the duties of this sub-postmaster are circumscribed in such a way that it is a misnomer to say that he is trading; looking at it in that way, what he is doing is not within the covenant, which is that "trading upon the land shall be restricted to chemistry and druggist's business and dentist or doctor." However wide that may be, it seems

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to me that it does not cover this case. The appeal must be dismissed.

WARRINGTON L.J. The question on this appeal is whether, according to the true construction of the covenant in the conveyance to the defendant, the use of the premises as a licensed post office by him since his appointment as sub-postmaster by the Postmaster-General, is the carrying on of a trade within the covenant in question. It is very important to see and remember the circumstances in which this covenant was entered into. The plaintiff is the owner of a row of recently erected shops, and as he sells or lets one of those shops he inserts in the conveyance or lease a covenant conferring on the purchaser or lessee thereof a modified monopoly —namely, the monopoly of a particular trade so far as that row of shops is concerned. That is the obvious reason and object for the insertion of these covenants.

In the present case he obtained from the purchaser the covenant in question, that "trading upon the land shall be restricted to chemistry and druggist's business and dentist or doctor." The defendant subsequently accepted from the Postmaster-General the appointment of sub-postmaster, which he took at a remuneration upon a certain scale fixed by the Postmaster-General, and he undertook the duty of sub-postmaster in this particular place, including of course not only the sale of stamps, postcards, and stamped envelopes, etc., but much more than that, for instance the payment through the post office of old age pensions and so on.

As an abstract proposition it may be true that the work which the Postmaster-General carries on and which is carried on by his agents on his behalf, is a trade, because he buys and retails stationery and other things, and he carries on the business of a carrier and a banker. All that may probably be true, but the question which we have to determine is, not whether as an abstract proposition the Postmaster-General can be said to be carrying on a trade, but whether as between the parties who made a contract of this kind, either of them conceived that the business carried on by the

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Postmaster-General or his agents on his behalf was a trade. When you look at the surrounding circumstances I think it is obvious that the parties did not contemplate the appointment of one of them as sub-postmaster or that the carrying on of a post office would be treated as within the covenant. That the plaintiff did not so regard it seems plain from the letter written on his behalf by his solicitors, which shows that the carrying on of a post office was an afterthought. The plaintiff did not put it expressly in the covenant which the defendant entered into, and in my opinion the carrying on of a post office is not covered by the covenant. The appeal must be dismissed.

SCRUTTON L.J. I agree.

(By consent the motion was treated as the trial of the action.)

Solicitors for the appellant: *James & Charles Dodd.*
Solicitors for the respondent: *W. R. Millar & Sons.*

R. M.

GROSS, SHERWOOD AND HEALD, LIMITED *v.* ESSEX COUNTY COUNCIL.

EVE J. 1926 *Oct.* 22.

[1926. G. 2162.]

Arbitration — Compulsory Purchase — Compensation — Official Arbitrator — Resignation through Illness—New Appointment by Reference Committee—Validity—Acquisition of Land (Assessment of Compensation) Act, 1919 (9 & 10 *Geo.* 5, *c.* 57), *s.* 1, *sub-ss.* 1, 3; *s.* 3, *sub-s.* 7—*Statutory Rules*, 1919, *by Reference Committee, r.* 6.

The Reference Committee appointed under the Acquisition of Land (Assessment of Compensation) Act, 1919, appointed an arbitrator to assess the compensation in a disputed claim by the plaintiffs upon a compulsory purchase of their land by the defendant Council.

After two sittings the arbitrator fell ill, and by a letter of July 11, 1925, resigned his appointment on the panel of official arbitrators, but hoped to clear up the work in hand. Before it was formally accepted his health improved and he attended to the private business of his firm, but was not able to proceed with the arbitration. His

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term of office expired on August 1, 1926. On August 30, 1926, the Committee revoked the appointment by letter to the plaintiffs, and appointed another official arbitrator to determine the question in dispute. The first arbitrator was now capable of completing the arbitration. In an action by the plaintiffs for a declaration that the notice revoking the first appointment was ultra vires, and for an injunction to restrain the arbitration by the new arbitrator:—

Held, that the first arbitrator having become disqualified under the provisions of the Act from acting as official arbitrator by engaging in private business before his term of office expired, and having resigned from the panel, the Committee had full authority by the rules made under the Act to appoint a new arbitrator.

MOTION.

The plaintiff company carried on business as manufacturers of paint and varnish at factory premises situated near the River Roding at Barking, in the county of Essex. By the Essex County Council (Barking Bridge) Act, 1923 (13 & 14 Geo. 5, c. lxvii.), the defendant Council obtained power to construct a bridge over the River Roding at Barking to carry the new East Ham and Barking by-pass road which was then contemplated, or under construction. This bridge was designed to cross the river at a point almost in the middle of the factory premises of the plaintiffs, and the approach to the bridge divided the plaintiffs' premises into two parts. On September 3, 1924, the Treasury Solicitor, acting as agent for the defendant Council, served upon the plaintiffs two notices to treat for the compulsory acquisition by the defendant Council of the plaintiffs' land specified in the notices. On December 12, 1924, the plaintiffs delivered formal notice of their claim for compensation amounting to over 70,000*l.*, together with detailed particulars. As no arbitrator could be agreed upon between the parties an application was made by the plaintiffs to the Reference Committee appointed under the Acquisition of Land (Assessment of Compensation) Act, 1919, to select an official arbitrator, and on October 13, 1925, the Reference Committee duly appointed Sir Anker Simmons as official arbitrator to assess the compensation. The arbitrator devoted one day to the inspection of the plaintiffs' premises, and on January 13 and 14, 1926, he proceeded with the hearing of the arbitration

in London. Counsel were engaged and both sides and witnesses heard. There was then an adjournment for some time in order to give the parties an opportunity of reaching an agreement for the settlement of the claim. No settlement was arrived at, and meanwhile the arbitrator fell seriously ill and was unable to proceed with the arbitration. On June 11, 1926, he wrote to the secretary of the Reference Committee saying that with great regret he found himself forced through ill health to resign his appointment as official arbitrator, but he would do his best to clear up the work in hand. On July 1, 1926, he again wrote to say that his health had much improved, but he did not know definitely whether he could continue the arbitration before August 1, 1926, the day when his appointment as official arbitrator for three years under the Act would be determined. Before that date arrived his health improved and he attended to the business of his firm. On July 16, 1926, he suffered a relapse, and no further step was taken in the arbitration. On August 30, 1926, the Reference Committee gave notice by letter to the plaintiffs revoking the reference to Sir A. Simmons and appointing Mr. Hugh C. Webster as official arbitrator in his place to determine the question in dispute. In October the health of Sir A. Simmons had greatly improved, and he was ready and willing and in a fit state of health to complete the arbitration. On September 15, 1926, the plaintiffs commenced the present action, and moved for a declaration that the notice revoking the appointment of the first arbitrator and appointing a new one in his place was ultra vires, and for an injunction to restrain the arbitration by the new arbitrator. It was agreed between the parties that the motion should be treated as the trial of the action. The relevant provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919, are as follows. (1)

(1) Sect. 1, sub-s. 1: "Where by or under any statute (whether passed before or after the passing of this Act) land is authorised to be acquired compulsorily by any Government Department or any local or public authority, any question of disputed compensation, and, where any part of the land to be acquired is subject to a lease which comprises land not acquired, any question as to the apportionment of the rent payable

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Sir Lynden Macassey K.C. and *Swords* for the plaintiffs. The case raises an important question whether a Government department could intervene in an arbitration and take it out of the hands of the duly appointed arbitrator and give it to another without the consent of the parties. The first arbitrator had resigned his position on the panel of official arbitrators owing to ill health, but was willing to complete existing business, and was now quite able to do so. We submit that there was no power under the rules made by the Reference Committee in these circumstances to appoint a new arbitrator, and r. 6, under which they purported to act, is ultra vires in this respect. (1) Considerable expense has already been incurred in the arbitration, and this will be thrown away if the matter has to be gone over again before the newly appointed arbitrator. Under the circumstances the first selected arbitrator should be allowed to complete his work.

Sir Thomas Inskip S.-G. and *Giveen* for the defendant Council were not called upon.

EVE J. The object of this action is to obtain a declaration that the notice served by the Reference Committee is ultra vires, and an injunction to restrain the defendant Council from acting thereon. The question arises out of a disputed

under the lease, shall be referred to and determined by the arbitration of such one of a panel of official arbitrators to be appointed under this section as may be selected in accordance with rules made by the Reference Committee under this section."

Sub-s. 3: "A person appointed to be a member of the panel of official arbitrators shall hold office for such term certain as may be determined by the Treasury before his appointment, and whilst holding office shall not himself engage, or be a partner of any other person who engages, in private practice or business."

By s. 3, sub-s. 7: "Subject as aforesaid, the Reference Committee may make rules regulating the procedure before official arbitrators."

(1) By the Statutory Rules and Orders made on December 2, 1919, by the Reference Committee under the provision in the Act, it was provided by r. 6 as follows: "The Reference Committee may, in the case of the death or the incapacity of the arbitrator originally selected, or if it is shown to the Committee that it is expedient so to do, in any other case, at any time before the arbitrator has made his award, revoke the reference of the question to the selected arbitrator and select another arbitrator for the purpose of determining the question."

claim for compensation by the plaintiffs against the Council, and the reference of the dispute to an arbitrator appointed by the Reference Committee, and the subsequent appointment of Mr. Hugh Webster as arbitrator in the place of the individual first appointed. In order to ascertain whether this second appointment is valid or, as the plaintiffs allege, outside the powers of the Committee, their statutory powers must be examined and the mode in which they were exercised be considered. By s. 1 of the Act it is provided that where land is authorized to be taken compulsorily for public purposes any question of disputed compensation shall be referred to and determined by such one of a panel of official arbitrators appointed under that section as shall be selected by the Reference Committee. Sir Anker Simmons was the arbitrator selected in the first instance, and no exception is taken to his appointment. Two sittings were held, and then there was an adjournment with the object of seeing whether the compensation claimed could not be reduced in view of certain accommodation works which the Council were prepared to provide. The adjournment continued for several months, in the course of which the arbitrator became seriously ill, and by a letter of June 11, 1926, he resigned his appointment on the panel of official arbitrators. Before this resignation was formally accepted his health improved, and he was able to attend and did in fact attend to the business of his own firm. By so doing he was obviously treating his appointment on the panel as having been determined, since by sub-s. 3 of s. 1 of the Act an arbitrator while holding that office is expressly prohibited from engaging by himself or as a partner in private practice or business. It is quite clear that he was disqualified from acting as an official arbitrator for some time before his term of office expired on August 1, 1926. The question is whether in these circumstances the Committee were authorized by the rules made under s. 1 of the Act to select a fresh arbitrator. It is argued that the rule relied on (r. 6) is in part ultra vires, but I cannot accept that view. The legislature must have contemplated that a selected arbitrator might die or become incapacitated before the reference was

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completed, and it must therefore be assumed to have intended that the rules to be made for the selection of the arbitrator would be so framed as to meet these contingencies and not to leave the Committee powerless if the arbitrator first selected became incapacitated from completing the inquiry. Accordingly r. 6 is framed thus. [His Lordship read the rule and continued :] I can see nothing ultra vires in that. On the facts I am satisfied that the first arbitrator, even before his term of office had expired, had disqualified himself as an arbitrator on the panel, and when the new selection was made I hold that the Committee had full authority to do what they did. The action will be dismissed with costs.

Solicitors : *Bircham & Co. ; The Treasury Solicitor.*

G. M.

CLAUSON J.
1926
Oct. 20.

In re BIRD.

WATSON *v.* NUNES.

[1926. B. 2535.]

Will—Appointment of Trustees—Declaration that they should be Trustees for the Purpose of the Settled Land Acts, 1882 *to* 1890*—Annuities—Residuary Estate in Trust for A. B. N. for Life, and after his Decease in Trust for his Sons who should attain Twenty-one—Direction to set aside sufficient residuary Estate to meet Annuities—Death of A. B. N., leaving three Sons, one of whom had attained Twenty-one—Part of residuary real Estate appropriated to meet Annuities — Real Estate, appropriated and unappropriated, settled Land for Purpose of Settled Land Act,* 1925*—Trustees of Will can exercise Powers of Tenant for Life—Settled Land Act,* 1925 (15 *Geo.* 5, *c.* 18), *s.* 1, *sub-s.* 1 (*iii.*), (*v.*) ; *s.* 19, *sub-s.* 1 ; *s.* 20, *sub-s.* 1 (*ii.*) ; *s.* 23, *sub-s.* 1 (*a*), (*b*) ; *s.* 117, *sub-s.* 1 (*ix.*).

The testator devised and bequeathed all his residuary estate to trustees upon trust to pay the net annual income thereof to A. B. N. for his life, and after his decease, then as to the capital and income of such residuary estate in trust for all the children of A. B. N. who being sons should attain the age of twenty-one years. A. B. N. died leaving three sons, the eldest of whom alone had attained the age of twenty-one years :—

Held, that the eldest son was now absolutely entitled to one-third of such income, and that the other two-thirds must follow the destination of the share or shares of the corpus of the residuary estate from which the income had arisen or should arise.

In re Stevens [1915] 1 Ch. 429 followed.

The testator directed his trustees to set aside and appropriate sufficient of his property to meet certain annuities bequeathed by his will. By a deed of appropriation the trustees appropriated certain freehold ground rents to meet such annuities. The testator declared that his trustees should be trustees of his will for the purpose of the Settled Land Acts, 1882 to 1890, and he further declared that they could exercise all the powers conferred on a tenant for life by the Settled Land Acts, 1882 to 1890:—

Held, that notwithstanding that "an undivided share in land" was excepted from the definition of "land" in s. 117, sub-s. 1 (ix.), of the Settled Land Act, 1925, as regards the land appropriated to meet the annuities, the will operated as a settlement within s. 1, sub-s. 1, of the Act, and as regards the other land the will operated as a settlement within the same sub-section, and that, therefore, as regards the whole of the residuary real estate the will operated as a settlement under the Act.

Held, that the appointment of the trustees of the will as trustees for the purpose of the Settled Land Acts, 1882 to 1890, made them, under s. 23, sub-s. 1 (*a*) (*b*), of the Act of 1925, trustees for the purposes of the settlement under that Act, and that they could, therefore, exercise the powers of a tenant for life.

BY his will dated July 17, 1902, the testator appointed trustees, and he declared that they should be trustees of his will for the purpose of the Settled Land Acts, 1882 to 1890, and, after making various pecuniary and specific gifts and providing for payment of his debts and funeral and testamentary expenses, he bequeathed a number of annuities, and devised and bequeathed all the residue of his property, both real and personal, to the use of his trustees upon trust, after payment thereout of all outgoings, to pay the net annual income thereof to A. B. Nunes for his life, and after his decease, then as to the capital and income of such residuary estate in trust for all the children of A. B. Nunes who being sons should attain the age of twenty-one years, or being daughters should attain the age of twenty-one years or marry under that age. The testator directed his trustees to set aside and appropriate sufficient of his property to meet the annuities bequeathed by his will, and he declared that such annuities should be a charge upon the properties so appropriated, but should not constitute a charge upon the remainder of his estate, and he declared that it should be lawful for his trustees to exercise over or in relation to all or any

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hereditaments of whatever tenure for the time being held upon the trusts of his will all such powers of leasing and sale and other powers of every description which might be applicable thereto as were, by the Settled Land Acts, 1882 to 1890, conferred upon tenants for life.

The testator died on October 4, 1902. By a deed of appropriation dated April 4, 1903, the trustees appropriated certain freehold ground rents to meet the annuities given by the will. A. B. Nunes died on January 5, 1918, leaving three sons, the defendant Reginald Antony Nunes, who has attained the age of twenty-one years, and the defendants Humphrey Osmond Nunes and Eric Charles Nunes, who have not yet attained the age of twenty-one years.

The plaintiffs, the trustees of the will, contracted to sell part of the testator's residuary real estate and also part of the real estate appropriated to meet the annuities bequeathed by the will, and the purchasers raised questions in each case as to whether the plaintiffs were trustees for sale of such residuary real estate and appropriated realty. The plaintiffs thereupon took out this summons asking whether they, as trustees of the testator's will, were trustees for sale of (*a*) the unrealized residuary real estate of the testator, and (*b*) the real estate of the testator, which had been appropriated to meet the annuities given by the will. If the plaintiffs were not such trustees for sale, to have it determined whether the residuary and appropriated real estate was settled land, and, if so, who was tenant for life or had the powers of a tenant for life under the settlement made by the will? A question was also raised by the summons as to who was entitled to the income of the residuary estate accruing between the date when the defendant R. A. Nunes attained the age of twenty-one years and the date when the defendants H. O. Nunes and E. C. Nunes should attain twenty-one or die under that age.

L. W. Byrne for the plaintiffs. The question the plaintiffs are interested in is, who can give title to this property? Before the Settled Land Act of 1925, the eldest son could

have given title to two-thirds as tenant for life, and to one-third, as absolute owner: see Wolstenholme's Conveyancing and Settled Land Acts, 10th ed., p. 462; *In re Walmsley's Settled Estates.* (1) As the eldest son is not entitled to two-thirds of the income, the property is held in undivided shares, and this creates a difficulty by reason of " an undivided share " being excepted in the definition of " land " in s. 117, sub-s. 1 (ix.), of the Act of 1925.

I. G. Kelly for the infant defendants. The infants take their share of the income: *In re Stevens* (2), where it was held that the words " as well the income as the corpus " expressed an intention on the part of the testator to dispose of the income together with the corpus as from the day of the death of the tenant for life. That case distinguished *In re Averill.* (3)

When dealing with the will of this testator, the Court is entitled to treat all land subject to its provisions as settled land, notwithstanding the fact that by reason of the provisions of the will some portions of it eventually become undivided shares. The meaning of the reservation in s. 117, sub-s. 1 (ix.), is that a settlement could not be made of one of the undivided shares.

W. H. Aggs for the defendant R. A. Nunes. The eldest son takes one-third of the property absolutely, and the other two-thirds contingently. The will is, therefore, a settlement within the definition of a " settlement " in s. 1, sub-s. 1 (iii.), of the Act of 1925, and a fortiori the trustees of the will became trustees of the settlement for the purposes of the Act, and they have full powers of sale.

CLAUSON J. [His Lordship held that R. A. Nunes having attained the age of twenty-one years was now absolutely entitled to one-third of the income of the testator's residuary estate, and that the other two-thirds of such income must follow the destination of the share or shares of the corpus of the residuary estate from which such income had arisen or should arise, and having stated the facts he continued:]

(1) (1911) 105 L. T. 332. (2) [1915] 1 Ch. 429.
(3) [1898] 1 Ch. 523.

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In view of the opinion I have formed on the question, dealt with below, as to the application of the Settled Land Act to this case it is unnecessary for me to decide whether the plaintiffs are trustees for sale of (*a*) the unrealized residuary estate of the testator, and (*b*) the real estate which has been appropriated to meet the annuities. If that question had to be determined, it might have involved a consideration of the true construction of certain provisions contained in Part IV. of Sch. I. to the Law of Property Act, 1925 (15 Geo. 5, c. 20), provisions which are to be found under the heading "Provisions subjecting land held in undivided shares to a trust for sale." As matters stand I do not propose to give any decision one way or the other as to the meaning or effect of those provisions.

The remaining question is: "If the plaintiffs are not such trustees for sale as aforesaid to have it determined whether the said residuary and appropriated real estate is settled land and, if so, who is tenant for life or has the powers of a tenant for life under the settlement thereof made by the said will." The question is asked in the form of being hypothetical upon its being held that the plaintiffs are not such trustees for sale. But I propose to answer this question as if that other question were not there. I do not propose to consider whether the trustees are trustees for sale or not, but I do propose to consider and determine whether, in the circumstances of this case, the residuary and appropriated real estate is settled land, and who has the powers of the tenant for life under the settlement made by the will, of those two classes of real estate.

It is convenient first to consider whether this land is settled land. It will be observed that the interests of the sons are interests in undivided shares, and it is material to note that in the definition of land, which is to be found in s. 117, sub-s. 1 (ix.), of the Settled Land Act, 1925, land includes land of any tenure, and includes a number of things which are not material here. The definition ends with this, that land includes "any estate or interest in land not being an undivided share in land." Accordingly, an undivided share in land cannot

be settled land, and that particular share cannot be settled land for the purposes of the Settled Land Act, 1925. But it may well be that land which is the subject-matter of a settlement of such a character that it is a settlement within s. 1, sub-s. 1, of the Act, will remain settled land, notwithstanding that ultimately some estate may come into being which is an estate in an undivided share only. Accordingly, it seems to me, that the mere fact that under this will the sons may become entitled in undivided shares to the land, does not prevent the land as a whole being subject-matter of a settlement under the Settled Land Act.

I then proceed to consider whether the will is an instrument which is a settlement for the purposes of the Settled Land Act within s. 1, sub-s. 1, of the Act. I will read first of all the words which are material in regard to that part of the real estate which is charged with the annuities. The section provides that any instrument by virtue of which any land after the commencement of the Act stands for the time being (sub-s. 1 (v.)) charged " with the payment of any rentcharge for the life of any person, or any less period, or of any capital, annual, or periodical sums for the portions, advancement, maintenance, or otherwise for the benefit of any persons, with or without any term of years for securing or raising the same; creates or is for the purposes of this Act a settlement and is in this Act referred to as a settlement, or as the settlement, as the case requires."

It is suggested to me that a question may arise whether these annuities do or do not come within the term rentcharge. I do not propose to decide whether they do or do not, but I propose to decide that in any case these annuities come within the term " annual . . . . or periodical sums . . . . for the benefit of any persons." It was suggested that a restricted sense must be attributed to the word " benefit " in that clause, that " benefit " there means something ejusdem generis with portions, advancement and maintenance, and accordingly that the word " benefit " must be construed in some restricted sense. I do not see any reason for construing it in a restricted sense; at all events, I see no reason to doubt

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that these annuities given, as they are, for the benefit of certain persons named in the will, are sums for the benefit of persons, and I accordingly decide as regards the residuary estate which has been appropriated to meet the annuities and is charged with the annuities, that in regard to that land the will operates as a settlement within the Settled Land Act.

As regards the other land which is not appropriated to meet the annuities I have to have recourse to another provision. Sect. 1, sub-s. 1, provides that an instrument "under or by virtue of which instrument or instruments any land, after the commencement of this Act, stands for the time being "—(iii.)—"limited in trust for any person for an estate in fee simple or for a term of years absolute contingently on the happening of any event." In my opinion those words apply to this case, for this reason : the son who has attained twenty-one appears to me to be a person of whom it is true to say that under the will land is limited in trust for him, for an estate in fee simple contingent on the happening of the various events, which would result in his being the only son left to claim the land, and that, in my opinion, justifies me in holding that, as regards that land, the will operates as a settlement under the Settled Land Act.

Having come to the conclusion as regards the whole of the residuary estate that the will operates as a settlement under the Act, it remains to be ascertained who has the powers of the tenant for life. It is reasonably plain that the appointment by the will of the trustees of the will as trustees for the purposes of the Settled Land Acts, 1882 to 1890, makes them trustees for the purposes of the settlement under the Settled Land Act, 1925. Under the Settled Land Act, 1925, if nobody else is found who is either a tenant for life or has the powers of a tenant for life, then under s. 23, sub-s. 1 (*a*), "any person of full age on whom such powers are by the settlement expressed to be conferred ; and (*b*) in any other case the trustees of the settlement ; shall have the powers of a tenant for life under this Act." In this case we have trustees for the purposes of the Settled Land Act, and further we have in the will a declaration that the trustees of the

will are to have all powers conferred by the Settled Land Acts on tenants for life. It is not necessary to consider on which ground the trustees can exercise the powers of the tenant for life; they either do so because they are named in the will as the persons who have those powers, or because they are the trustees. But that is only if there is nobody else to be found who has the powers of the tenant for life; and, accordingly, I proceed to see whether I can find anybody other than the trustees who is a tenant for life or who has the powers of a tenant for life.

Taking the land which has been appropriated to meet the annuities, nobody has been suggested to me as coming within the category either of tenant for life or a person who has the powers of a tenant for life. Sect. 19, sub-s. 1, provides that the tenant for life is: "The person of full age who is for the time being beneficially entitled under a settlement to possession of settled land." It is quite plain that the annuitant cannot be said to be in possession of settled land, so the annuitant must be discarded, as the annuitant is not a person with such powers. If the annuitant is discarded so a fortiori are the three sons of A. B. Nunes to be discarded, for as the matter stands none of them are entitled in possession to the appropriated land. Taking next the residuary land not appropriated to the annuities, I cannot find a tenant for life among the sons of A. B. Nunes. True it is that one of them, the son who has attained twenty-one, may be entitled to possession of a share of settled land; but having regard to the definition of "land," and exclusion from land of an undivided share, I cannot see how that circumstance can possibly bring him within the category of tenant for life.

But I still have another section to deal with. I must find whether as regards either category of land, either that appropriated to meet the annuity or that not so appropriated to meet the annuity, s. 20 provides me with the persons who have the powers of the tenant for life. Sect. 20 begins: "Each of the following persons being of full age shall, when his estate or interest is in possession, have the powers of a tenant for life."

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It has been pointed out to me that under s. 20, sub-s. 1 (ii.): "A person entitled to land for an estate in fee simple or for a term of years absolute with or subject to, in any of such cases, an executory limitation, gift, or disposition over on failure of his issue or in any other event," may have the powers of a tenant for life. That is perfectly true, and it may well be that the son who has attained twenty-one may be said to be a person entitled to land for an estate in fee simple, subject to a disposition over on the footing that he may be entitled to the entirety of the land, but subject to having his title diminished as other children attain twenty-one. Assuming that to be so, and I am not for a moment suggesting it is not, he cannot be said to have that interest in possession, and accordingly it seems to me that he is debarred from claiming to be a person who has the powers of a tenant for life under s. 20.

That leaves me in this position, that I am entitled to fall back on s. 23 and hold that it is the trustees of the settlement, for the time being, thereby appointed trustees for the purposes of the Settled Land Acts, who are now the persons who can exercise the powers of a tenant for life; and I propose to hold that accordingly.

Solicitors for all parties: *Watson, Sons & Room.*

P. J. B.

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[1926. F. 1453.]

Easement—Light—Prescription—Obstruction—Lessor and Lessees—Reservation to Lessor of Right to build upon "adjoining" Lands so as to obstruct Light —Consent or Agreement—Prescription Act, 1832 (2 *&* 3 *Will.* 4, *c.* 71), *s.* 3.

The owner of a certain settled estate in Birmingham granted a building lease of certain premises and the site thereof to the plaintiff for a term of ninety-nine years, reserving, nevertheless, unto the lessor and his lessees and tenants full right to build to any height upon the land adjoining the demised premises notwithstanding such building might obstruct any light on the land demised. The defendants had an agreement for a lease for ninety-nine years from the then owner of the same estate of land opposite the plaintiff's house and premises, but separated therefrom by a party passage 10 feet wide. They intended to erect buildings on the other side of the narrow passage to a height of 62 feet, which would admittedly seriously interfere with the plaintiff's uninterrupted enjoyment of access of light for the statutory period. In an action by the plaintiff for an injunction to restrain this contemplated obstruction to his light and air:—

Held, (1.) that on the facts the effect of the reservation in the plaintiff's lease extended to the land on the other side of the party passage and was "adjoining" land within the meaning of the clause.

Held, (2.) that the reservation must be construed as a grant by the lessee to the lessor of the full right to build on the adjoining land notwithstanding the resultant injury to the light enjoyed by the demised premises, and was an agreement expressly made for that purpose by deed within s. 3 of the Prescription Act, 1832.

Haynes v. *King* [1893] 3 Ch. 439 followed.

Mitchell v. *Cantrill* (1887) 37 Ch. D. 56 distinguished.

MOTION.

The plaintiff, Arthur Henry Foster, of The Moorlands, Green Road, Moselev. in the city of Birmingham, solicitor, had carried on his business on the ground floor of the buildings known as No. 13 Bennett's Hill, Birmingham, for at least forty years prior to November, 1925. The drawing office and upper parts of the said building were in the occupation of an architect Frank Barlow Osborn until his death in 1907. By an indenture of lease dated June 20, 1901, made between William Frederick Inge (the lessor) and Frank Barlow Osborn (the lessee) W. F. Inge demised and leased to

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F. B. Osborn for the term of ninety-nine years from September 29, 1899, at the rent of 136*l.* 10*s.*, the said premises known as 13 Bennett's Hill and the site thereof therein described and containing in the whole 182 square yards and delineated on the plan drawn thereon, and coloured pink, and also a right of way in common with the other lessees and tenants of the lessor and occupiers of the adjoining property over the party road or passage leading from the rear of the premises thereby demised into New Street, the lessee paying from time to time a proportionate part of the expense of keeping the same in repair in common with the other lessees and tenants of the lessor and occupiers of the adjoining property entitled to the use of the said passage, "reserving nevertheless to the lessor, and his lessees and tenants, full right to build to any height upon the land adjoining the land and premises hereby demised, notwithstanding such buildings may obstruct any light on the land hereby demised." In the plan referred to in this lease the words "other land of the lessor" were written on the north and south sides of the demised premises, but not opposite across the passage. The lease also contained a covenant by the lessee that he would not at any time during the continuance of the demise after the buildings should have been erected, alter the elevation or structure thereof, or cut or maim any of the main timbers thereof without the previous consent in writing of the lessor, or his agents. By an indenture dated October 21, 1907, made between F. B. Osborn and F. H. Walford and the plaintiff A. H. Foster, the messuage and premises demised by the lease of June 20, 1901, were assigned to the plaintiff for all the residue then unexpired of the lease of ninety-nine years. In the plaintiff's building there were three large windows to the ground floor office abutting upon and overlooking the said party passage leading from the rear of the premises into New Street, which passage was about 10 feet wide, and known as Fire Office Passage; and there were three windows in the drawing office on the first floor facing over the said passage, and four area gratings. The buildings next the party passage measured in the centre

34 feet or thereabouts in height. The buildings on the opposite side of the party passage were of such varying heights as not to form an objectionable obstruction to the access of light and air to the plaintiff's buildings.

On April 7, 1925, Miss Hilda Mary Inge (the owner of the Ingle estate) and her trustees entered into an agreement with the defendants, J. Lyons & Co., Ld., as soon as the building agreed to be erected by them should be completed and fit for use to the satisfaction of the surveyor of the owner, to demise to the company a piece of land and five messuages erected thereon in New Street, Birmingham, together with the use in common of the party passage for the term of ninety-nine years from March 25, 1926, at a premium and yearly rental therein mentioned. From the plan of the proposed new building in New Street the wall of the building opposite the plaintiff's windows of No. 13 Bennett's Hill and within 10 feet of it across the party passage would be not less than 62 feet high. On these facts becoming known a correspondence followed between the plaintiff's solicitors and those of Messrs. J. Lyons & Co., Ld., commencing by a letter of July 12, 1926, in which the former alleged that the plaintiff as leaseholder claimed to have acquired a prescriptive right of light through all his windows and gratings, and there was nothing in his lease to preclude the acquisition of such a right. To this the defendants' solicitors replied on August 20, 1925, and contended that the terms of the lease itself negatived the rights claimed, as it reserved to the lessor, his lessees and tenants, full right to build to any height, notwithstanding that such building might obstruct any light of the demised premises. To this the plaintiff's solicitors replied that the reservation in the lease was inserted for the purpose of excluding complaints by the lessee that the lessor had derogated from his grant, and that the clause in question did not prevent a lessee from acquiring under the Prescription Act, 1832, an easement of light and air which was effective against the landlord as well as the other tenants of his. Further letters followed on the legal points raised, and on September 22, 1926, the plaintiff issued his

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writ and moved for an interim injunction restraining the defendants from obstructing the access of light and air to the plaintiff's premises in the city of Birmingham known as No. 13 Bennett's Hill by the erection of a building or wall on land opposite to the said premises and separated therefrom by a narrow passage.

Gover K.C. and *Dighton Pollock* for the plaintiff. Two points of law arise in this case, the first as to the true meaning to be attached to the word "adjoining" in the reservation by the lessor in the lease of June 20, 1901; and secondly, whether that reservation is a "consent or agreement expressly made or given for that purpose" within the meaning of s. 3 of the Prescription Act. (1) On the first point there are numerous cases in which the word "adjoining" has been construed by the Courts. Its primary meaning is defined to be absolutely contiguous with, or in actual or physical contact with, as in *Vale & Sons* v. *Moorgate Street and Broad Street Buildings* (2); *Ind, Coope & Co.* v. *Hamblin* (3); *White* v. *Harrow* (4); *Mayor of Wellington* v. *Mayor of Lower Hutt* (5); *Rex* v. *Hodges* (6); and *Haynes* v. *King*. (7) There are cases pointing in the opposite direction where a wider or secondary meaning has been given to the word "adjoining." Our submission is that in this case that having regard to the position of the passage between the two portions of land the defendants' land cannot be held to be "adjoining" within the meaning of the reservation.

[They also referred to *In re Bateman and Parker's Contract* (8) and *Cave* v. *Horsell*. (9)]

(1) By s. 3 of the Prescription Act, 1832, it was enacted "that when the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

(2) (1899) 80 L. T. 487.
(3) (1900) 81 L. T. 779.
(4) (1902) 50 W. R. 259.
(5) [1904] A. C. 773.
(6) (1829) 1 Moo. & M. 341.
(7) [1893] 3 Ch. 439.
(8) [1899] 1 Ch. 599.
(9) [1912] 3 K. B. 533.

Wilfrid Greene K.C. and *Ernest Booth* for the defendants were not called upon on the first point.

EVE J. I do not think that the facts of this case involve any question whether the word "adjoining" should be construed strictly, or whether, having regard to the context and such circumstances as are to be taken into account, some secondary meaning ought to be attached to it. The question arises under the reservation by the lessor. [His Lordship read the reservation and continued:] It is, of course, clear that that reservation must be limited to any land of the lessor adjoining the premises. What land of the lessor was there adjoining these premises at the date of this demise? There was land to the north and south, that is admitted. There was land of the lessor consisting of this party passage which also adjoined the premises, and by this document the lessor purported to grant a right of way over this party passage to the lessees in common with other occupiers of the adjoining premises and extending over the whole of the passage to and from New Street. It follows that the parties must be taken to have realized that that land was land of the lessor. In these circumstances the reservation would extend to a right to build over so much of the party passage as could be built over without interfering with or derogating from the grant of the right of way. Once having got the party passage admitted or proved to be the land of the lessor there is nothing which would justify me in saying that the operation of this reservation is to be limited by the breadth of the passage, and that it does not extend continuously so far as the land of the lessor continues, to the west. There must, of course, be a limit ascertainable by the amount of interference, that is to say, the reservation is only operative and of use so far as any building on the adjoining land might interfere with the light. So far as his building will not interfere with the light, the reservation does not affect it. In my opinion, it is impossible to say that this land which was continuous so far as the passage way was concerned, was determined or bounded by the wall on the other side of the

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passage way, and I think it extended throughout. Then it is said that it might have been so if there had been no plan on the deed, and even if the plan had been silent as to a description or notice of what was land of the lessor. I think there are two answers to that argument. I do not think the plan has anything to do or is in any way concerned with this reservation. The subject-matter of the demise is delineated by the measurement inserted, being the four sides of a rectangle. In order to make it quite clear of what the rectangle consists, and what is the subject-matter of the demise, the plan is added. It does not seem to have any relation to the reservation. But assuming I am wrong in that, one has to look at the place and to have regard to the expression "other land of the lessor" which is to be found on the land bounding these premises north and south. I cannot bring myself to believe that those words were put on as being intended to limit the operation of the reservation, for this reason, that in the view which I take of the position of the party passage, that was land which the grantee must have known was land of the lessor. It may well be that this expression was inserted on the north and south sides of the demised premises for the purpose of informing the grantee that the land on each side of the demised premises was also land of the lessor. But whether that be so or not, it would be, in my opinion, impossible to hold that these words operated to exclude from the ambit of the reservation land which comes within this description, land contiguous to the land demised. I hold, therefore, that the effect of the reservation extends to the land on the other side of the party passage, and is not limited either to land capable of being built over on the area by the side of the party passage, or to so much of the opposite land as is coterminous with that part of the party passage. It extends to the land on the far side, whether that land is coterminous with the part of the land that has been built over, or includes so much of the party passage as is opposite the plaintiff's premises.

On the second question.

Gover K.C. and *Dighton Pollock* for the plaintiff. This reservation in the lease is equivalent to an exception by the grantor from his grant of the lease and was inserted with the object of avoiding any claim by the lessee that the lessor was thereby derogating from his grant. It resembles *Morgan* v. *Fear* (1), where there were two leases from a common owner, and it comes exactly within the decision in *Mitchell* v. *Cantrill* (2), which it is submitted governs this case, and where Cotton L.J. expressly decided a similar point. The plaintiff has had uninterrupted enjoyment of light and air to his windows for more than the statutory period of twenty years, and is entitled to an absolute right under the Prescription Act to the access of that light. The effect of the reservation is, we submit, limited to negativing the lessee's right under the implied covenant of the lessor not to derogate. The decision in *Mitchell* v. *Cantrill* (2) is to be preferred to that in *Haynes* v. *King* (3), where the facts were quite different, and the decision of North J. is distinguishable in that he held in terms that the premises in that case were adjoining or contiguous premises. Further, the agreement under the Prescription Act must be given for a particular and express purpose to enable the person to enjoy the right: *Hyman* v. *Van Den Bergh* (4); *Bewley* v. *Atkinson*. (5)

In the present case until the grantor chose to build the lessee would enjoy his right to light; there was no intention here to give a right to enjoy light, but merely to except or take away the right which the lessee would otherwise have possessed. Whether this was an exception or a reservation, it is not such an agreement or consent in writing as was contemplated by the section, and the decision of North J. in *Haynes* v. *King* (3) should not be followed.

Wilfrid Greene K.C. and *Ernest Booth* for the defendants. This is a reservation precisely within the decision of North J. in *Haynes* v. *King* (3), and it is referred to in Key and

(1) [1907] A. C. 425.
(2) (1887) 37 Ch. D. 56, 60.
(3) [1893] 3 Ch. 439.
(4) [1907] 2 Ch. 516.
(5) (1879) 13 Ch. D. 283.

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Elphinstone's Precedents, 11th ed., vol. i., p. 382, and the note thereon.

This is a case of a regrant by the lessee to the lessor of the right to build so as to obstruct light: *Doe* v. *Lock* (1), where the difference between exceptions and reservations is considered. The word "reservation" has no technical meaning. This is a reservation and not an exception, as in *Mitchell* v. *Cantrill* (2); Prideaux's Precedents, 21st ed., vol. ii., p. 77. None of the text-books quarrel with the decision of North J. in *Haynes* v. *King*. (3) This is an agreement or consent as to the enjoyment of light. The effect of the whole document is to confer the privilege of the enjoyment of light, but only so long as the lessor chooses not to obstruct: *Bewley* v. *Atkinson*. (4) The agreement is amply sufficient to satisfy the statute.

Gover K.C. in reply. Whether this proviso is called an exception or a reservation, it is the same thing, as in *Mitchell* v. *Cantrill*. (2) Its effect is to keep back something which otherwise the lessee would have.

Cur. adv. vult.

Nov. 3. EVE J. By this motion the plaintiff, the occupier and lessee for a term of ninety-nine years from September 29, 1899, of a house and premises known as 13 Bennett's Hill, Birmingham, seeks an injunction until judgment or further order to restrain the defendants, who derive title from his lessor, from obstructing the access of light to the said house and premises by the erection of a building on land situate opposite to the said premises and separated therefrom by a narrow passage.

For the purposes of this motion it is conceded that the erection of the said building will materially interfere with the access of light which the plaintiff has enjoyed for the period of twenty years before action brought. The defence is that the same was enjoyed by an agreement expressly made for that purpose by deed within the meaning of s. 3

(1) (1835) 2 Ad. & E. 705.
(2) 37 Ch. D. 56.
(3) [1893] 3 Ch. 439.
(4) 13 Ch. D. 283.

of the Prescription Act. The agreement set up is to be found in the lease whereby the lessor demised the messuage and premises, and also a right of way in common with his other lessees and tenants over the narrow passage into New Street, "reserving nevertheless unto the lessor, and his lessees, and tenants, full right to build to any height upon the land adjoining the land and premises hereby demised notwithstanding such buildings may obstruct any lights on the land hereby demised." The question is whether the words I have just read operate as an agreement within the section or were only meant to negative the implied right which the lessee would otherwise have had of insisting that the lessor should not derogate from his own grant by building on the adjoining land—in other words, does the case fall within the decision in *Haynes* v. *King* (1) or that in *Mitchell* v. *Cantrill*? (2) It cannot be disputed that if the words in question had not been inserted the lessee by virtue of the lessor's implied covenant not to derogate from his grant would have been entitled to the continued access over the lessor's land of the light actually enjoyed at the date of the demise, and that by the uninterrupted enjoyment thereof for the statutory period he could have acquired an absolute right under the Act to the access of that light. As the lease contains a covenant by the lessee not to alter the elevation or structure of the demised premises without the written consent of the lessor the only windows in the contemplation of the parties to which the reservation was directed must have been those in existence at the date of the demise. Whether the right to which the lessor lays claim by virtue of the qualifying words can really be described as a reservation I very much doubt, but the matter cannot be disposed of by criticism of this nature. One must find out the substance of the contract, and in my opinion the words must be construed as a grant by the lessee to the lessor of the full right to build on his adjoining land notwithstanding the resultant injury to the light of the demised premises.

Can the effect of this grant be cut down to a period of twenty years or be limited, as the plaintiff contends, to a

(1) [1893] 3 Ch. 439. (2) 37 Ch. D. 56.

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negation of the lessee's right under the lessor's implied covenant not to derogate? I do not think it can. In *Mitchell* v. *Cantrill* (1) Cotton L.J., as I read his observations, was of opinion that if you could find a contract that the lessor notwithstanding the grant should be at liberty to build so as to obstruct this would not be confined to the negation of the lessor's obligation not to derogate but would be an express agreement under the statute, and in *Haynes* v. *King* (2) North J. construed a proviso giving the lessors power to build on their adjoining land as they might think fit, although such building should affect or diminish the light of the demised premises, as a grant by the lessee to the lessors of that right and as an express provision that the enjoyment of light by the lessee under the lease was to last only until the lessors should require to exercise the right granted to them by the contract contained in the proviso.

The conclusion at which I arrive is that the clause in this deed—though somewhat inaccurately described—is an agreement to the same effect as that in *Haynes* v. *King* (2), and that the enjoyment of light since the date of the lease has been of a permissive and determinable character.

As I have already held that the land on which the defendants are building was and is adjoining land within the meaning of the lease, I can make no order on the motion except that the costs be costs in the action. If the parties elect to treat this hearing as the trial the action will be dismissed with costs.

Solicitors: *Hopgood, Mills, Steele & Co., for Foster, Pettitt & Simcox, Birmingham; Bartlett & Gluckstein.*

(1) 37 Ch. D. 56, 60. (2) [1893] 3 Ch. 439.

G. M.

In re OGLE'S SETTLED ESTATES.

ROMER J.

1926

June 17; *July* 2.

[1926. O. 435.]

Settled Land—Sale of various Plots prior to 1926—*Whether Land still settled under Settled Land Act,* 1925—*Appointment of new Trustees of Lands originally settled—Difficulty with regard to Properties sold—Service of Notice on Purchasers—Whether Purchasers necessary Parties to Proceedings—Persons interested—Court's Discretion—Settled Land Act,* 1925 (15 *Geo.* 5, *c.* 18), *s.* 1, *sub-s.* 1 (*i.*) *and* (*v.*); *s.* 31, *sub-s.* 1.

A., being the tenant for life of certain settled estates under a settlement made in 1862, duly disentailed the same in 1920 and limited them to himself in fee simple. The lands in question were subject to a jointure rentcharge, and A. sold various portions prior to 1926 subject to the charge but in each case with a covenant of indemnity.

On the Settled Land Act, 1925, coming into force, A. applied to the Court for the appointment of two persons as trustees under the original settlement of 1862 for the purposes of the Act.

The point having been raised whether such persons on appointment might not, by virtue of s. 31 of the Settled Land Act, 1925, be trustees for the purposes of the Act not only in respect of the lands to which A. was still beneficially entitled in fee simple but also in respect of the lands already sold, a summons was taken out for the determination of this question:—

Held, that on the coming into force of the Settled Land Act, 1925, the whole of the estate became, by virtue of s. 1, sub-s. 1 (v.), settled land, but the part vested in A. was the subject-matter of one settlement and each part vested in a purchaser was the subject-matter of another settlement, though each settlement was brought about by one and the same document—namely, the original settlement of 1862.

The different portions of the land being subject to different settlements, there was nothing in the language of s. 31 of the Settled Land Act, 1925, which would, under the circumstances, prevent the Court from appointing trustees of the one settlement without those trustees thereby becoming trustees of any of the others. (1)

ADJOURNED SUMMONS.

By an indenture dated March 13, 1862, the Kirkley Estate in the county of Northumberland was limited and settled to the use of Edward Chaloner Ogle for life, with remainder to the use of John Savile Ogle for life, with remainder to the use of the first and every other son of the said John Savile Ogle in tail male with remainder to the use of Newton

(1) It may be convenient to note that the Law of Property (Amendment) Act, 1926, passed while this case was before the Court, is believed not to affect the decision.

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Charles Ogle for life, with remainder to the use of the first and every other son successively of the said Newton Charles Ogle in tail male. Edward Chaloner Ogle died in the year 1869 and John Savile Ogle died a bachelor in the year 1892.

By an indenture dated October 10, 1903, Newton Charles Ogle, in pursuance of a power in that behalf contained in the indenture of 1862, charged the estates as from his death with a jointure rentcharge in favour of his widow, who was still living. Newton Charles Ogle died in the year 1912, having by his will, in exercise of a further power in that behalf given to him by the indenture of 1862, charged the estate with the payment of portions for his two daughters.

By an indenture dated September 15, 1920, John Francis Chaloner Ogle (the eldest son of Newton Charles Ogle) duly disentailed the estate and limited the same to himself in fee simple. Thereafter, and before January 1, 1926, John Francis Chaloner Ogle, as owner of the Kirkley Estate, sold various parts thereof to numerous purchasers, subject to the said jointure rentcharge, but in each case covenanted with the purchaser to indemnify him and the land conveyed against the said charge. The said lands so conveyed were, however, released from the said portions under the provisions of the Conveyancing Acts by payment into Court of a sum sufficient to meet them.

On the coming into force of the Settled Land Act, 1925, an application was made to the Court by J. F. C. Ogle for the appointment of two persons as trustees under the settlement created by the indenture of March 13, 1862, in the hereditaments mentioned in the title to the summons for the purposes of the new Act. The lands in question were described in the title to the summons as "the lands and hereditaments known as the Kirkley Estate in the county of Northumberland, and all other the hereditaments settled by the settlement created by the indenture of March 13, 1862."

On the matter coming before the learned judge in chambers, attention was drawn to the fact that by reason of the sales of various parts of the settled lands prior to 1926, it might

happen that the trustees when appointed would or might, by virtue of the Settled Land Act, 1925, s. 31, or otherwise, become thereupon trustees for the purposes of the Act, not only in respect of the lands to which the applicant J. F. C. Ogle was beneficially entitled for an estate in fee simple, but also in respect of the lands, to which the purchasers became entitled for a like estate.

The matter was therefore adjourned into Court for argument on this point.

C. J. W. Farwell K.C. and *L. Tillard* for the applicant. It is desired to appoint new trustees of the original settlement, and a difficulty arises by reason of s. 31 of the Settled Land Act, 1925. (1)

It would appear prima facie that the settlement would comprise the whole of the lands originally settled, including those portions sold prior to 1926.

If this is the true view a difficulty would arise, because the Court is being asked to appoint new trustees in the absence of many of the parties interested.

This, it is submitted, would be contrary to the practice of the Courts: see Annual Practice, 1926, p. 1058. The Court however, has a discretion, and it is submitted under the circumstances here could appoint new trustees without requiring these purchasers to be before the Court.

[ROMER J. The difficulty seems to be, can the Court appoint new trustees of a portion of the property notwithstanding there is only one settlement?]

If that were so there would be a difficulty no doubt, but it is submitted that the true view is not that there is only one settlement, but that in the case of each of the properties sold there is a separate settlement, and the settlement which the Court is now asked to appoint trustees of, is the settlement

(1) Settled Land Act, 1925, s. 31, sub-s. 1: "Persons who are for the time being trustees for the purposes of this Act of an instrument which is a settlement, or is deemed to be a subsisting settlement for the purposes of this Act, shall be the trustees for the purposes of this Act of any settlement constituted by that instrument and any instruments subsequent in date or operation."

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of the lands of which the applicant is the present tenant for life; that is the unsold portions of the land originally settled. If this is so it is submitted there would be no difficulty in making the order asked for.

Linton T. Thorp for persons interested.

July 2. ROMER J. [after stating the facts as set out above continued:] But for the sales effected by the applicant before the coming into operation of the Settled Land Act, 1925, the matter was simple enough, and I should have made the order in chambers when it first came before me. My attention was, however, very properly drawn to the fact that these sales had been made, and it was suggested that if I made the order as asked, the trustees, when appointed, would, or might, by virtue of s. 31 of the Act, or otherwise, thereupon become trustees for the purposes of the Act, not only in respect of the lands to which the applicant is beneficially entitled for an estate in fee simple, but also in respect of the lands to which the purchasers became entitled for a like estate. If this were really so, then it would not, prima facie, seem right to make the order in the absence of the purchasers, or those claiming under them. On the other hand, it would not only involve the applicant in great expense, but would impose upon him a long and difficult task were I to insist on those persons being served. I therefore directed the matter to be adjourned into Court for argument in order to see whether an appointment of trustees would have the suggested result, and if it should have that result, then to see if some way could be found out of the difficulty.

After giving the matter the best consideration I can, it seems to me that the result to which I have referred can be avoided.

By s. 1, sub-s. 1, of the Act, it is provided, so far as material for the present purpose, as follows: [His Lordship read s. 1, sub-s. 1 (i.) and (v.) (1)] In some parts of the Act no doubt

(1) Settled Land Act, 1925, s. 1, sub-s. 1: "Any deed, will, agreement for a settlement, or other agreement, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this

"settlement" means merely the document or documents creating the settlement: see, for example, ss. 1, sub-s. 4, 47 and 64. But in general a settlement, for the purposes of the Act, is a state of affairs in relation to certain land, brought about, or deemed to have been brought about by one or more documents, the particular state of affairs being one or more of those specified in sub-ss. (i.) to (v.) of s. 1, sub-s. 1. A document may, therefore, create more than one settlement. If by means of one and the same document, Blackacre and Whiteacre stand limited in trust for A. and his children in strict succession, and for B. and his children in strict succession respectively, there are two settlements. In one case the settled land is Blackacre, and A. is the tenant for life under the "settlement"; in the other the settled land is Whiteacre, and the tenant for life under the "settlement" is B.

If the Court appoints trustees for the purposes of the Act of the one settlement, they do not thereby become trustees for the purposes of the other. And all this is, I conceive, equally true, even if, by the document, both Blackacre and Whiteacre have been subjected to one and the same jointure rentcharge ranking in priority to the respective limitations in favour of A. and his children and B. and his children.

But now suppose that A. and B. being dead, their eldest sons disentail and resettle the two properties. Each of the properties is now the subject-matter of a compound settlement, that is to say, a state of affairs exists in relation to it,

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Act, under or by virtue of which instrument or instruments any land, after the commencement of this Act, stands for the time being:—

(i.) Limited in trust for any persons by way of succession; or

. . . . .

(v.) Charged, whether voluntarily or in consideration of marriage or by way of family arrangement, and whether immediately or after an interval, with the payment of any rentcharge for the life of any person, or any less period, or of any capital, annual, or periodical sums for the portions, advancement, maintenance, or otherwise for the benefit of any persons, with or without any term of years for securing or raising the same;

creates or is for the purposes of this Act a settlement and is in this Act referred to as a settlement, or as the settlement, as the case requires."

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brought about by more than one instrument—namely, by the original document, the disentailing deed and the resettlement. If, now, trustees are appointed of the settlement of Blackacre created by the original document, which settlement is still deemed to be in existence by reason of s. 3 of the new Settled Land Act, or is actually in existence because that document brought about a state of affairs in relation to Blackacre such as is mentioned in s. 1, sub-s. 1 (v.), those trustees will, by virtue of s. 31, become trustees for the purposes of the Act of the compound settlement of Blackacre. But they will not thereby become trustees of the compound settlement of Whiteacre. For, though s. 31 of the Act in terms refers to persons who are "trustees . . . . of an instrument which is a settlement, or is deemed to be a subsisting settlement," it can only mean trustees of a settlement which is created by the instrument, or which is deemed to be subsisting by virtue of that instrument. Trustees of a settlement are not in strict language properly described as trustees of the instrument creating it, except in so far as the instrument may be held by them as trustees. The same remarks will apply if, instead of resettling Blackacre, the eldest son of A. merely disentails it and so becomes entitled to it absolutely, subject only to the rentcharge. In consequence of the rentcharge Blackacre is still settled land. But the state of affairs in relation to this property that makes it settled land is brought about by the original instrument alone. It would not "stand for the time being charged" with the payment of the rentcharge under or by virtue of that instrument and the disentailing deed. There would not therefore be any compound settlement of Blackacre. Each property would, however, still be the subject of a separate settlement, and if trustees were appointed of the one, they would not thereby become trustees of the other.

Now it seems to me that similar considerations would arise if both properties, having been originally settled subject to the jointure upon A. and his children in strict settlement, the eldest son of A., after A.'s death, disentails the properties and resettles Blackacre and Whiteacre in different ways, or

resettles the latter and not the former. The properties would be still settled land, but they would, as it seems to me, be subject to different settlements. If trustees were appointed of the whole settlement created by the original document, they would, no doubt, by virtue of s. 31 of the Act of 1925, be trustees of any compound settlement whether of Blackacre or Whiteacre created by the original document, the disentailing deed and the resettlement. I should, however, have thought that if trustees were appointed of the settlement of Blackacre constituted by the original deed, they would not thereby become trustees of the settlement of Whiteacre, whether regarded as a settlement brought about by the operation of the original deed alone, or as one brought about by the operation of the original deed, the disentailing deed, and the deed of resettlement.

I can now turn to the particular facts of the case before me. When the applicant disentailed, he became, of course, entitled to the settled land absolutely, subject only to the family charges. But this was before the coming into operation of the Act of 1925. He did not resettle the estates, and according to the decision of Warrington J. in *In re Trafford's Settled Estates* (1) he accordingly ceased to be able to exercise the powers of a tenant for life under the Settled Land Acts then in force. He could not, therefore, sell free from the rentcharge, except with the concurrence of the jointress, and, as already stated, the conveyances to the various purchasers were all made subject to her jointure. On December 31, 1925, accordingly the Kirkley Estate was, as to part, vested in the applicant for an estate in fee simple, and, as to other parts, in the various purchasers for a like estate, assuming that no purchaser had settled the land conveyed to him subject to the jointure rentcharge and the portions, in the one case, and to the jointure rentcharge alone, in the other. In this state of affairs, I am of opinion that no part of the Kirkley Estate was at that date settled land, for the reasons recently given by me in my judgment in *In re The Earl of Carnarvon's Chesterfield Settled Estates.* (2)

(1) [1915] 1 Ch. 9. (2) Ante, p. 138.

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But when the Settled Land Act of 1925 came into force on January 1, 1926, the whole estate became settled land by virtue of the provisions in s. 1, sub-s. 1 (v.). In my opinion, however, the part vested in the applicant was the subject-matter of one settlement, and each part vested in a purchaser was the subject-matter of another settlement. Each settlement was, it is true, brought about by one and the same document—namely, the original settlement. But in each case the person having the powers of a tenant for life was the person in whom the estate was vested: see s. 20, sub-s. 1 (ix.), and *In re The Earl of Carnarvon's Settled Estates.* (1)

If then the different portions of land are subject to different settlements, I think, for the reasons I have given, that I can appoint trustees of the one settlement without those trustees thereby becoming trustees of any of the others. In order that this appointment may be made, the summons should be amended by being entitled: "In the matter of the lands and hereditaments forming part of the Kirkley Estate in the county of Northumberland remaining vested in John Francis Chaloner Ogle on the 31st December, 1925, for an estate in fee simple settled by an indenture dated the 13th March, 1862, and made between," etc., and I will appoint the persons mentioned in the summons as trustees for the purposes of the Act of the settlement of those lands.

The costs as between solicitor and client will be taxed and paid out of the said settled property.

Solicitors: *H. W. Perkins & Co.; Pennington & Son, for Clayton & Gibson, Newcastle-on-Tyne.*

(1) Ante, p. 138.

A. R. T.

CLAUSON J.

1926

Oct. 21.

In re PINK.

ELVIN *v.* NIGHTINGALE.

[1922. P. 3404.]

Administration—Insolvent Estate—Proof of Insolvency—Solvency a Question of Fact—Judicature Act, 1875 (38 & 39 *Vict. c.* 77) *s.* 10—*R. S. C.*, 1883, *Order* LV., *r.* 5A (*e*).

In order to qualify an annuitant (to whom a person who died in 1922 was liable under a judgment by consent to pay the annuity) to prove for the value thereof in the administration by the Court of the deceased person's estate, it is sufficient for the annuitant to prove, as a fact, that if the annuity continues for the period normally to be expected, the estate will not suffice to meet the debts and the annuity in full.

SUMMONS.

In order to put an end to certain differences which had arisen between the testator, Walter Pink, and the defendant, Theresa Nightingale, the testator offered to pay her the sum of 2*l.* a week, and did for a considerable period regularly pay her that sum. In consequence of the testator having stopped payment, the defendant brought an action against him in the King's Bench Division, which resulted in a judgment by consent upon terms which, in substance, were that, provided the defendant abstained from molesting him and did not use the name of Pink, the testator agreed to pay to the defendant the sum of 2*l.* a week so long as she should live.

By his will made in 1917, the testator appointed the plaintiffs executors thereof and after bequeathing some legacies, appointed Rachel Verheyden his residuary legatee. The annuity of 2*l.* a week was, from the date of the judgment, regularly paid by the testator down to the time of his death on October 27, 1922, and payment thereof was continued for some time thereafter by his executors, until realizing that, after payment of the testator's other debts, his estate would only be sufficient to provide for the annuity during a few years, they took out an originating summons for the administration of the testator's estate to which, in the first

CLAUSON J. 1926 PINK, *In re.* ELVIN *v.* NIGHTINGALE.

instance, the only defendant was Miss Nightingale, the annuitant; and on March 26, 1923, the usual order was made for the administration of the testator's personal estate. The Court held that the administration proceedings were irregular in their inception, as the requirements of Order LV., r. 5A (*e*), were not complied with, owing to the absence of a beneficiary as a party, but that such irregularity was cured by service of notice of the judgment on the residuary legatee on July 25, 1924, thereby enabling the rights of the defendant Nightingale to be determined in the administration proceedings notwithstanding that, when the administration proceedings began, she was not a creditor: see *In re Hargreaves*. (1)

In pursuance of the usual directions the Master made his certificate, by which he certified, in substance, that the residuary estate amounted to about 1100*l*. while there were debts outstanding to an amount of about 50*l*. It was further certified that the capital value of the annuity was 1403*l*. 11*s*. 7*d*., and that, having been reduced by payments on account thereof, the amount due to the annuitant was the sum of 1,197*l*. 16*s*. 7*d*.

At a later stage the Master's attention was called to the question of making some deduction from his original valuation owing to the fact that the annuity would cease if the annuitant were to take the name of Pink. But the Master refused to allow any such deduction.

A summons was accordingly taken out in the administration proceedings by the residuary legatee, asking that the Master's certificate might be discharged or varied, in so far as it certified that a debt of the testator to the defendant, Nightingale, had been allowed, and that there was due to her in respect of such debt the sum of 1197*l*. 16*s*. 7*d*.

L. Morgan May for the residuary legatee. The onus lies upon the creditor to prove that the testator's estate is insolvent before she can prove for her annuity. The only liability towards her which the trustees are under consists in

(1) (1890) 44 Ch. D. 236.

the payment of 2*l.* a week as it periodically falls due; and, the payments having been regularly made, and at the present time no debt or liability existing, she cannot claim to be a creditor. It is not competent to her to prove insolvency by claiming to bring into account against the estate the capital value of the annuity, if the estate, apart from that, is otherwise solvent. Except for the order for administration she would have no right to have the annuity capitalized; the only right she had was to be paid the instalments of the annuity as each instalment fell due: Williams on Executors, 11 ed., p. 786: *Read* v. *Blunt.* (1)

The facts in *In re Leng* (2), where the estate was rendered insolvent by the payment out of it of the costs of administration, distinguish that case from the present, where the estate is not shown to be insolvent, until the annuity comes to be valued. The judgment taken by consent was conditional upon the annuitant not molesting the testator and not taking the name of Pink. The assurance office did not take that contingency into account in valuing the annuity as it ought to have done. The Court is asked here to go behind the judgment and to say there was no consideration for it, because the consent order made bore no relation to the relief sought in the action: *Ex parte Anderson* (3) and *Ex parte Lennox.* (4)

J. D. Israel for the plaintiffs in the administration action.

A. J. Belsham for Miss Nightingale, the annuitant. *In re Leng* (2) and *In re Milan Tramways Co.* (5) are authorities for saying that an executor is bound to treat the estate as insolvent until it is proved to be solvent. Lord Selborne said in the latter case (6), "The 10th clause of the Judicature Act, 1875, must be treated as applicable to any company in liquidation until it is shown that the assets are sufficient for payment of the debts in full." The annuity ought to be valued for the purpose of determining whether the estate is solvent: *Wroughton* v. *Colquhoun.* (7) Where, as in this case, it is not possible to aver that the estate will be sufficient

(1) (1832) 5 Sim. 567.
(2) [1895] 1 Ch. 652.
(3) (1885) 14 Q. B. D. 606.
(4) (1885) 16 Q. B. D. 315.
(5) (1884) 25 Ch. D. 587.
(6) Ibid. 591.
(7) (1847) 1 De G. & Sm. 357.

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to pay the debts and the annuity, the rules in bankruptcy are applicable and the Court will value the annuity. It is not possible for the Court to determine whether the estate is insufficient to pay the annuity, except by valuing the annuity. The contingency of the annuitant taking the name of Pink is, in the circumstances, negligible. If executors take upon themselves to distribute an estate without having provided for the annuity, they do so at their own risk: *Taylor* v. *Taylor*. (1)

CLAUSON J. [after having dealt in the manner above stated with the preliminary objection to the summons for administration grounded on the absence of proper parties, and after stating the facts as above set out, including the refusal of the Master to make any deduction from his original valuation of the annuity, proceeded as follows:] In my opinion the Master was in substance right, and the conclusion he reached was that at which I should myself have arrived, save that I might have made a nominal reduction in the valuation of the annuity, merely to record that the fact that the annuity was forfeitable upon the annuitant taking the name of Pink had not escaped my consideration. It is obvious that the annuitant would not be likely to do any act which would have the effect of forfeiting her annuity. No doubt, had the condition upon which her annuity was made to cease been the happening of some event beyond the control of the annuitant, the matter must have worn a different aspect, and some substantial reduction might in such a case have been proper.

The Master having valued the annuity, the question in this case is, whether he was justified in doing so. He took the view that he was obliged to treat the estate as insufficient for the payment of the debts in full within the meaning of s. 10 of the Judicature Act, 1875, if, in fact, the estate of the testator, although otherwise solvent, was shown to be insolvent if the value of the annuity were taken into the account of debts. It may be of interest to observe, although it is not

(1) (1870) L. R. 10 Eq. 477.

material for the purpose of this case—the testator's death having occurred before the commencement of the Administration of Estates Act, 1925—that in the case of death after December 31, 1925, s. 10 of the Judicature Act, 1875, has been superseded by s. 34 and the First Schedule of the new Act of 1925; and that the second rule in Part I. of the First Schedule of that Act is substantially a reproduction of s. 10 of the Judicature Act, 1875. The question I have to answer is whether, for the purpose of testing the solvency of the estate, I am justified in treating the capitalized value of this annuity as a debt. Although the language of s. 34, sub-s. 1, of the new Act is not quite the same as that of s. 10 of the old Act, yet the problem is the same. I put the question to myself: is there good reason for believing, on the materials available in this case, that the estate will turn out to be insufficient for payment of the testator's debts in full? For the purpose of answering that question, it becomes necessary to set a value upon this annuity which is a liability of the testator. The case of *In re Milan Tramways Co.* (1) was the case of a company in liquidation, and the same 10th section of the Act of 1875, provided that in the winding up of a company, whose assets might prove insufficient for the payment of its debts and liabilities, the rules of bankruptcy should prevail. In that case the Earl of Selborne L.C. said (2): "The 10th clause of the Judicature Act, 1875, refers only to a company unable to pay its debts, but I am of opinion that it must be treated as applicable to any company in liquidation until it is shown that the assets are sufficient for payment of the debts in full." That case shows that the section applies, unless the assets of the company are shown to be sufficient; but in the case of a company the fact of its being in liquidation may induce a prima facie assumption that the assets will be insufficient. In the case of the administration of a deceased person's estate there does not seem to exist any reason for making such an assumption. The question in this case is, after all, one of fact, whether there is good ground for believing this estate to be insolvent. That can only be ascertained

(1) 25 Ch. D. 587. (2) 25 Ch. D. 591.

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by finding out the value of the annuitant's interest; and that again must depend upon the expectation of her life. This lady is fifty-five years of age, and the evidence shows that if she lives for the period normally to be expected, the expenditure required to meet the annuity will be so large as to render the estate insufficient to pay the testator's debts in full. In the result, I am of opinion that I am entitled to draw the inference from the facts before me, that the estate is insolvent. In my judgment, the view taken by the Master is the right one and, consequently, I refuse the application to vary his certificate.

Solicitors: *Kimbers, Williams & Co.; Judge & Priestley; Appleton & Co.*

H. C. H.

CLAUSON J. 1926 *Oct.* 22.

In re GRAY.

PUBLIC TRUSTEE *v.* WOODHOUSE.

[1926. G. 1408.]

Tenant for Life and Remainderman—Repairs—Substantial structural Repairs—Incidence of Cost of Repairs—Trustee for Sale—Powers of Management—Jurisdiction of Court to make equitable Apportionment—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 28—*Settled Land Act,* 1925 (15 *Geo.* 5, *c.* 18), *s.* 102.

By virtue of s. 28 of the Law of Property Act, 1925 (the operation of which is not limited to the period of a minority), trustees for sale have in relation to the land the powers of management conferred by s. 102 of the Settled Land Act, 1925, including the power to repair mentioned in sub-s. 2 (*b*), and by virtue of sub-s. 3, power to pay the expenses incurred in management or in the exercise of any of the powers conferred by that section out of the income of the land.

Since January, 1926, it has become the duty of trustees for sale of settled land to execute the statutory powers so conferred upon them, so far as may be necessary for the performance of their trust; and it is no longer necessary for them to apply the equitable principles of apportioning the expenses between income and capital as explained in *In re Hotchkys* (1886) 32 Ch. D. 408.

Therefore, where, in the absence of any express powers or provisions in the settlement relating to repairs, a block of freehold flats, settled in favour of a tenant for life with beneficial remainders over and held upon trust for sale, had not been kept in a proper state of repair for a period of several years, with the result that a considerable sum was

required to defray the expenses of substantial structural repairs so rendered necessary:—

Held, first, that those repairs were repairs authorized by s. 102, sub-s. 2 (*b*), of the Settled Land Act, 1925, and the expenses thereof were properly incurred by the trustee and payable out of the income of the settled land: and, secondly, even if, upon the proper construction of s. 28 of the Law of Property Act, 1925, those statutory powers were only exercisable during a minority, the expenses incurred by the trustee would, by virtue of sub-s. 2 of s. 28 of the Law of Property Act, 1925, nevertheless, still be payable out of the income of the land, as the expression "repairs" in that sub-section bears the same wide meaning as the word "repair" in sub-s. 2 (*b*) of s. 102 of the Settled Land Act, 1925.

ADJOURNED SUMMONS.

By an order of the Chancery Division of the High Court of Justice made on August 11, 1898 (in proceedings, the short title of which is *In re Gray*. *Gray* v. *Gray*, 1898, G. 1), it was declared that the share of one Robert Stannus Gray, which was bequeathed to him by the will of his deceased mother, Rosalie Tucker Gray, dated January 16, 1894, was settled upon him for his life with remainder to his children, and it was thereby ordered that trustees should be appointed of his settled share of her estate. The will of the testatrix did not contain any powers or provisions relating to repairs or management.

The property subject to the trusts of the settlement consisted of a sum of 769*l*. 5 per cent. War Loan and a block of twelve separate sets of flats known as "Clapham Court," King's Avenue, Clapham, in the county of London. Those flats became subject to the trusts of the settlement in the following manner: In 1905, the trustees of the settlement advanced a sum of 3750*l*., part of the trust estate on a mortgage of the flats. On February 17, 1918, they foreclosed the same, thus becoming trustees for sale: see Conveyancing Act, 1911, s. 9; Law of Property Act, 1925, s. 31; and since that date, at the request of all the beneficiaries under the settlement, they retained the flats unsold. On September 2, 1919, Robert Stannus Gray was adjudicated bankrupt, and on May 8, 1923, his life interest under the settlement was sold and assigned to the defendants, Walter Mantell Woodhouse and William Osmund.

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For the year 1925, the rents received amounted to 831*l.* 4*s.* 8*d.*, and the outgoings (including the cost of internal repairs) amounted to 402*l.* 10*s.* 4*d.*, leaving a net balance of rent of 428*l.* 14*s.* 4*d.* Internal repairs during the past five years had, without objection on the part of the persons entitled to the rents, been paid for out of income. No painting or repairs had been done to the exterior of the premises since the year 1917, with the result that in 1925 substantial structural repairs became necessary and the plaintiff (as the present trustee of the settled trust property) obtained estimates for such repairs, the lowest of which amounted to 201*l.* 6*s.*

Acting on the instructions of the plaintiff, his solicitors asked the surveyor to make a short report stating the nature of the repairs required. In reply thereto, the surveyor wrote a letter, dated October 23, 1925, to the plaintiff's solicitors, in which he stated that the principal item of the work required was the outside painting, which had not been done since 1917; also that there were various other items of work, comprising the pointing of a parapet and of walls and chimneys, repairing roof, gutters, skylights and sash frames, and he added that the necessity for the repairs was brought about by lapse of time and use and wear and tear of the premises.

None of the beneficiaries objected to the work being done or to the estimate obtained by the plaintiff; but the assignees of the life interest at first claimed that the expenses should be paid for out of capital, although they subsequently proposed that they should be borne in equal shares by capital and income. The remaindermen claimed that the whole of those expenses should be borne by income, more especially as the rents of the property had been increased under the provisions of the Increase of Rent and Mortgage Interest (Restriction) Act, 1920, in respect of the increase allowed by that Act, where a landlord was responsible for the whole of the repairs.

This summons was taken out on June 8, 1926, by the plaintiff, to which the assignees of the life interest of Robert

Stannus Gray in the settled property and his four children beneficially entitled in remainder were made defendants, asking (1.) whether the plaintiff ought to execute all necessary and proper repairs to the flats held by him on trust for sale, in so far as under the tenancies affecting the same the tenants were not liable to do those repairs; (2.) whether the cost of carrying out the repairs estimated at 201*l.* 6*s.* ought to be borne by the income or the capital of the settled property or ought to be apportioned between income and capital, and (3.) generally, that directions might be given in what manner the expenses of repairs to the premises, while retained unsold, ought to be provided.

The material sections in the Law of Property Act, 1925, and the Settled Land Act, 1925, are sufficiently set out in the judgment of the Court.

H. F. F. Greenland for the Public Trustee.

John W. F. Beaumont for the assignees of the life interest. Before 1926, and apart from statute law, a Court of equity would assist trustees in adjusting the costs of repairs on equitable lines as between tenant for life and remainderman. In *In re Hotchkys* (1) the trustees had a power of sale, but no express powers of management or of applying the rents in keeping the property in repair were conferred upon them by the settlement; and it was there held that there was an obligation upon the trustees for the purpose of carrying out their trust, to keep the property in a proper state of repair, and that the Court would direct the expenses to be raised in such a way as not to throw the burden unfairly either upon tenant for life or remainderman. What Lindley L.J. said (2) in giving his judgment in that case still applies: "If it is shown that it is judicious to make repairs, and the trustees come to the Court for authority to make them, that authority will be given, but it will be given on equitable terms as to the mode of paying the expenses." The Court still possesses and will in a proper case exercise that equitable discretion which has not been taken away from it by the new legislation.

(1) 32 Ch. D. 408. (2) 32 Ch. D. 420.

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In this case it is harsh upon the assignees of the life interest that present income should be applied in making good the waste which has been suffered during the past eight or nine years. It is submitted that the power contained in sub-s. 3 of s. 102 of the Settled Land Act, 1925 (if, indeed, that section applies to the present case), to pay the expenses of repairs out of income has reference only to the expenses of current repairs.

Upon the proper construction of s. 28 of the Law of Property Act, 1925, the powers conferred upon trustees for sale by reference to the powers conferred by the Settled Land Act, 1925, upon the trustees of the settlement are exercisable only during a minority.

By s. 102, sub-s. 1, of the Settled Land Act, 1925, the trustees of the settlement "may" enter into and continue in possession of the land, and in that case the subsequent provisions in sub-s. 2, as to management, are made to apply; but the power to enter given by sub-s. 1, and to pay the expenses of management, including those incurred in the exercise of any power, out of income as provided by sub-s. 3, is only permissive and in the discretion of the trustees, a discretion which they should exercise upon the principle of *In re Hotchkys* (1): a principle which was adopted in other cases of which *In re Freman* (2) is an example. Trustees for sale have, under s. 28 of the Law of Property Act, 1925, the powers of management conferred by s. 102 of the Settled Land Act, 1925, and it is not disputed that the term "repairs" in s. 28, sub-s. 2, must bear the same meaning as "repairs" in s. 102. But those powers are only discretionary, and the trustees are under no obligation to apply the rents in defraying the expenses of these very substantial repairs. Some of the "repairs" in question almost amount to "improvements," the cost of which may be replaced out of income by yearly instalments: see ss. 71, 83, 84 and 85 of the Settled Land Act, 1925, and Third Schedule thereto.

Ernest G. Palmer for the remaindermen. The exercise of the powers of management, including the power to pay the

(1) 32 Ch. D. 408. (2) [1898] 1 Ch. 28, 33.

expenses out of income conferred upon the trustees by s. 28 of the Law of Property Act, 1925, is not confined to the period of a minority by that section. Upon the proper construction of s. 102, sub-s. 2, sub-cl. (*b*), of the Settled Land Act, 1925, the power to repair must be given the widest meaning and is not restricted to doing current repairs; nor do any of the repairs in question come within any of the improvements specified in the Third Schedule to the Settled Land Act, 1925. They are clearly authorized by s. 28 of the Law of Property Act, 1925, and particularly by sub-s. 2 of that section, and the expenses of executing them ought to be paid out of income. Since the new legislation, it is unnecessary to call in aid the equitable principles of adjustment between capital and income laid down in *In re Hotchkys*. (1) The true significance of that case appears from the classification in Underhill on Trusts, 8th ed., p. 264.

CLAUSON J. [after stating the facts above set out proceeded as follows:] Since the foreclosure order in 1918, these freehold flats to which the questions raised by the summons relate, first by virtue of s. 9 of the Conveyancing Act, 1911, and afterwards of s. 31 of the Law of Property Act, 1925 (which replaces the provision of the earlier Act), have been held upon trust for sale, and accordingly the Public Trustee (as the present trustee of the settlement) holds the settled property upon trust for sale.

The first point to consider is: what are the statutory powers now vested in him in regard to this property in the circumstances I have stated? I am referred to s. 28 of the Law of Property Act, 1925, where I find these provisions, sub-s. 1: "Trustees for sale shall, in relation to land"—I am omitting a few words which are obviously immaterial—"and to the proceeds of sale, have all the powers of a tenant for life and the trustees of a settlement under the Settled Land Act, 1925, including in relation to the land the powers of management conferred by that Act, during a minority: and (subject

(1) 32 Ch. D. 408.

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to any express trust to the contrary) all capital money arising under the said powers shall, unless paid or applied for any purpose authorized by the Settled Land Act, 1925, be applicable in the same manner as if the money represented proceeds of sale arising under the trust for sale." Sub-s. 2: "Subject to any direction to the contrary in the disposition on trust for sale or in the settlement of the proceeds of sale, the net rents and profits of the land until sale, after keeping down costs of repairs and insurance and other outgoings shall be paid or applied, except so far as any part thereof may be liable to be set aside as capital money under the Settled Land Act, 1925, in like manner as the income of investments representing the purchase money would be payable or applicable if a sale had been made and the proceeds had been duly invested." I find that in s. 102 of that Act the powers which appear to be referred to in s. 28 of the Law of Property Act, 1925, are powers of management conferred upon the trustees of a settlement during minority. I find this: "If and so long as any person who is entitled to a beneficial interest in possession affecting land is an infant, the trustees appointed for this purpose by the settlement, or if there are none so appointed, then the trustees of the settlement, unless the settlement or the order of the Court whereby they or their predecessors in office were appointed to be such trustees expressly provides to the contrary, or if there are none, then any persons appointed as trustees for this purpose by the Court on the application of a guardian or next friend of the infant, may enter into and continue in possession of the land on behalf of the infant, and in every such case the subsequent provisions of this section shall apply." I am of opinion that those provisions apply in this case by reason of s. 28 of the Law of Property Act, notwithstanding that it was not during a period of minority that the repairs were executed. As I understand s. 28 of the Law of Property Act, 1925, the powers of management contained in s. 102 are to be exercisable by trustees for sale, and the reference to "minority" in s. 28 is merely in order to make it quite clear that the powers thereby conferred are the powers in relation to settled

land which are conferred upon the trustees of a settlement during minority by s. 102. Then sub-s. 2 of that section is as follows: "The trustees shall manage or superintend the management of the land, with full power." Then follow various powers set out under eight sub-clauses. The material one for this purpose is sub-cl. (*b*): "To erect, pull down, rebuild, and repair houses, and other buildings and erections," with a proviso that "where the infant is impeachable for waste, the trustees shall not commit waste." Sub-cl. 3 says: "The trustees may from time to time, out of the income of the land, including the produce of the sale of timber and underwood, pay the expenses incurred in the management, or in the exercise of any power conferred by this section, or otherwise in relation to the land, and all outgoings not payable by any tenant or other person, and shall keep down any annual sum, and the interest of any principal sum, charged on the land." Assuming I am right in the view that s. 102 of the Settled Land Act, 1925, applies to this case and the trustee of this settlement has the powers mentioned in that section, it appears to me that he has the power to repair the flats, which are the subject-matter of the present application; he has power to rebuild them, he has power from time to time out of the income of the property to pay the expenses incurred in the management or in the exercise of any power conferred by this section; in other words, he has power to pay out of income the cost of repairing the flats, and he is even entitled in a proper case to pay out of income the expense of rebuilding them. Going back to sub-s. 2 of s. 28 of the Law of Property Act, 1925, there can be no question that the income of the investments representing the purchase money of this property when sold would belong to the first two defendants, as assignees of the life interest under the settlement, and I find in the sub-section that it is the duty of a trustee for sale to pay to the tenant for life the income of the investments representing the net proceeds of the land, after keeping down the cost of repairs. I see no reason to doubt that the expression "repairs" in that sub-section has

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a meaning corresponding to that of the expression "repair" in sub-s. 2 (*b*) of s. 102 of the Settled Land Act, 1925; and, accordingly, I see no reason to doubt, whether or not s. 102 applies to this case, that the trustee would be acting in accordance with the law, if he applied the income of this property in paying for the repairs which he has carried out. It is suggested that some part of the repairs were of a character that excluded them from "repairs" within the meaning of sub-s. 2 (*b*). It is suggested that a line ought to be drawn between current repairs and repairs of a more substantial nature or repairs occasioned by the fact that for some years the property had not been properly or sufficiently repaired from year to year. But I do not think that I am justified in cutting down the expression "repairs" in sub-s. 2 (*b*) of s. 102. I have looked at the specification. There are only one or two small items that it might be suggested are on a rather different footing to the other items. In my view they all come within the term "repairs" in the broad sense in which the term is used in sub-s. 2 (*b*), and I do not think that, having regard to the fact that the Legislature has put (as in my opinion it has) "expense of repairs" and "expense of rebuilding" on the same footing, it was intended by the Legislature to give a restricted meaning to the word "repairs." I think that the intention of the Act is to save the trustee from being too meticulous in considering the character of the repairs, whether they are normal current repairs or whether they go beyond that.

That being the position, the argument for the tenant for life who seeks to throw some of the repairs on capital is this: True it is, he says, that under this new legislation the trustee has power to do these repairs and to pay for them out of income; but that does not preclude him from doing that which he could have done before the Act of 1925 was passed; it does not preclude the Court from authorizing him to do the repairs, and then directing him to apportion the repairs between income and capital in the way that might seem equitable. In the case of *In re Hotchkys* (1) to

(1) 32 Ch. D. 408, 418, 420.

which I was referred, the Court charged those repairs on capital. In that case the question was discussed whether there was a power or trust for sale, but it is immaterial for my purpose in the case with which I am concerned to go into that distinction. Certain repairs had to be done; there did not appear to be a legal power in anybody to do the repairs or a provision as to the way in which the repairs should be borne. The matter came before the Court of Appeal, and that Court took the view that the trustees ought, for the purpose of properly carrying out their trust with regard to the property—namely, the trust ultimately to sell the property—to see that the property did not fall into decay from want of proper repair; and it was held by the Court (I am quoting the words of Lindley L.J. in dealing with the matter): "If it is shown that it is judicious to make repairs, and the trustees come to the Court for authority to make them, that authority will be given, but it will be given on equitable terms as to the mode of paying the expenses," and it was held that equity would be done if the expenses of the repairs were borne by capital, with the result that the tenant for life's income would be to some extent diminished. That was done in a case in which there was no specific power in the documents which regulated the rights of the parties, and no statutory power either to repair or to deal with the costs of repairs in any particular way. The suggestion made is that, notwithstanding the passing of these new Acts, that equitable jurisdiction of the Court still remains, that the right that the trustee had of coming to the Court and getting authority to do the repairs has not been swept away, and that the Court still has jurisdiction to deal with the costs of repairs in the way dealt with in *In re Hotchkys*. (1) My view is that the Acts are intended, as far as possible, to be a complete code. The exact position of trustees in cases of this kind was left in some doubt before these Acts were passed. There was the authority of *In re Hotchkys* (1), but nevertheless so far as statute law was concerned trustees were left without guidance.

(1) 32 Ch. D. 408.

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In my view the Legislature has set out to give the trustee, simply and clearly, definite statutory powers, whereas formerly, in such a case, he had to rely upon the principles of equity to guide him as to his powers. Now he looks at the statute and finds there a statement of the powers he has and the way he can exercise them. In my view, having regard to the provisions I have referred to, the duty of the trustee is to execute the statutory power—namely, to do such repairs as he thinks are proper repairs, when necessary for the purpose of carrying out the trust, and he can do that under his statutory powers. Having a statutory power he is in a wholly different position from that of the trustee whom the Court sought to assist in *In re Hotchkys.* (1) There being then no statutory power, the Court had to apply general equitable principles. I see no reason why the Court, having the statute before it, should fall back upon those principles. I see no reason why the Court should not leave the trustee to deal with the matter under the statutory power given to him by the Legislature, and, under those circumstances, it appears to me the right course for the trustee to take is to do the repairs and to use his statutory power of paying for those repairs out of income.

For these reasons I propose to make an order to the effect that the costs of carrying out the repairs mentioned in the summons, amounting to 201*l.* 6*s.*, ought to be paid by the trustee out of the income of the property.

Solicitors: *C. E. W. Ogilvie & Co.; Peacock & Goddard; Martin & Barry O'Brien.*

(1) 32 Ch. D. 408.

H. C. H.

In re FREDERICKE AND WHITWORTH.

Ex parte HIBBARD.

C. A. 1926 *Oct.* 22, 25.

Bankruptcy—Judgment—Bankruptcy Notice—Act of Bankruptcy—Second Bankruptcy Notice in respect of same Debt—Available Act of Bankruptcy under First Notice—Debtor, whether bound to comply with Second Notice—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 2.

Where a petitioning creditor has issued and served upon a debtor a bankruptcy notice which has not been complied with he is not thereby precluded from issuing and serving a second bankruptcy notice upon the debtor in respect of the same debt; and the debtor is not entitled to excuse himself from compliance with the second notice on the ground that there is an existing available act of bankruptcy under the first notice.

Observations of Fletcher Moulton L.J. in *Ponsford, Baker & Co.* v. *Union of London and Smith's Bank* [1906] 2 Ch. 444, 452 explained.

Appeals from two orders of Mr. Registrar Warmington.

The first appeal was from an order refusing to set aside the service of a bankruptcy petition, and the second was from a receiving order made upon the petition.

The facts are fully stated in the judgment of the Master of the Rolls, and were shortly as follows:—

On January 29, 1926, the petitioning creditors recovered judgment in an action in detinue against the debtors for the delivery up of nineteen pictures or their total value, 1452*l.*, and costs. The pictures had been entrusted to the debtors, who carried on business in partnership, for sale on commission. At the date of the order fourteen of these pictures had in fact been returned. On February 17, 1926, the petitioning creditors served a bankruptcy notice founded on the judgment on the debtors. This notice, owing to informality, was ordered to be withdrawn on March 2. On the same day, March 2, a second bankruptcy notice was issued and served on one of the debtors at the firm's place of business. It was not complied with, and an act of bankruptcy became complete on March 10. On March 11 the debtor paid a sum of 100*l.*, being 95*l.* on account of the judgment debt and costs and 5*l.* on account of the costs of the bankruptcy

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notice, on the terms of a letter under which no further proceedings were to be taken until after May 1. On May 14 a third bankruptcy notice was issued for 857*l.* 3*s.* 4*d.* and costs then remaining due, and on May 31 that notice was served on one of the debtors at their business address. It was not complied with, and the act of bankruptcy therefore became complete before June 24, when the petition was presented. The petition was based on the third bankruptcy notice. On July 27 the debtors applied to the Registrar to set aside the service of the petition on the ground that the premises on which the petition was served, together with the debtors' business, had been assigned to a company. The Registrar refused to set aside the service of the petition, and on the following day, July 28, made a receiving order against the debtors.

The debtors appealed against both orders of the Registrar. The two appeals were heard together on October 22, 1926.

On the appeal against the order to set aside the service of the petition the Court held upon the facts that the petition had been properly served and dismissed the appeal.

The only question calling for a report arose on the appeal against the receiving order—namely, whether the debtors were bound to comply with the third bankruptcy notice, the non-compliance with which formed the basis of the petition.

Clayton K.C. and *Oscar Kean* for the appellants. It is submitted that the bankruptcy notice upon the non-compliance with which the petition was based is bad. The petitioning creditors were unable to enforce payment under it, because by their previous notice they had put it out of the power of the debtors to deal with their assets. We rely on the observations of Fletcher Moulton L.J. in *Ponsford, Baker & Co.* v. *Union of London and Smith's Bank.* (1)

[They also referred to *In re Follows.* (2)]

R. Fortune for the petitioning creditors. The fact that the same petitioning creditors file two bankruptcy notices

(1) [1906] 2 Ch. 444, 452. (2) [1895] 2 Q. B. 521, 524.

within a period of three months is not uncommon, and the fact that debtors have two bankruptcy notices against them within three months by different petitioning creditors is an every day occurrence. There can be no difference in principle as to acts of bankruptcy overlapping, between acts of bankruptcy under bankruptcy notices issued by the same petitioning creditors and bankruptcy notices issued by different petitioning creditors. There was here nothing in principle to prevent the petitioning creditors in the circumstances of this case from issuing a fresh bankruptcy notice. By issuing the third bankruptcy notice they elected to wipe out the second bankruptcy notice.

Clayton K.C. in reply referred to *In re Feast* (1) and *In re Phillips.* (2)

[LORD HANWORTH M.R. referred to *In re G. E. B.* (3)]

LORD HANWORTH M.R. These are two appeals from the Registrar: (1.) from his refusal to set aside the service of a petition and (2.) from a receiving order made by him upon the petition. The facts are common to both cases. The two debtors, Mrs. Mabel Fredericke and Mr. L. M. Whitworth, were partners in the business of fine art and antique dealers carried on by them as the King's Galleries, 65 King's Road, Chelsea, from February 18, 1924, to January 27, 1926. On March 14, 1924, an action in detinue was brought against them by the petitioning creditors, Mr. and Mrs. Hibbard, to recover nineteen pictures or their full value—1452*l.*, which had been entrusted to the firm for sale on commission and not returned. On January 29, 1926, judgment was given for the return of the pictures. As a matter of fact fourteen of the pictures valued at 510*l.* had then been returned, but five pictures valued at 942*l.* had not been returned. A question was raised before us whether the order had been properly drawn up, as in the action it was not pleaded that certain of the pictures had been returned. I think it was correct to draw up the order in the form in which it was

(1) (1887) 4 Mor. 37. (2) (1888) 5 Mor. 40.
(3) [1903] 2 K. B. 340.

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drawn up. It is clear that at all material times there was still part of the judgment unsatisfied.

It is alleged by the debtors that on January 27, 1926, the partnership was dissolved and that on February 4, 1926, the business and premises of the firm were assigned to a limited company, the International Art Depositories, Ld., that after that date the business of the firm was no longer carried on by them on the premises in King's Road, and that the company entirely effaced the firm and took its place. The evidence makes it clear that the company was never an effective company. Only three shares were subscribed for, and the company could not have paid for any goods handed over to it. It does not appear that there was any displacement of the firm's business which continued; there is no evidence of any transfer of goods; the partners still paid the wages of the man who was employed in King's Road. As found by the learned Registrar it is not possible to accept the evidence that the firm had ceased to exist, and the company had taken its place. The business of the firm was, however, in the course of being wound up.

The first appeal is from an order of the Registrar refusing to set aside the service of the petition on the debtors. On February 17, 1926, the first bankruptcy notice (No. 497 of 1926) was served. On February 27 notice was given to dispute the bankruptcy notice on the ground that the judgment debt was therein incorrectly stated, and on March 2 an order was made to withdraw the notice. On the same day, March 2, a second bankruptcy notice (No. 646 of 1926) was issued and served by a clerk to the petitioning creditors' solicitors on one of the debtors at the firm's place of business. It was not complied with, and an act of bankruptcy became complete on March 10. On March 11 the debtors paid the sum of 100*l.*, being 95*l.* in respect of the judgment debt and costs and 5*l.* on account of the costs of the bankruptcy notice, on the terms of a letter under which it was agreed that no further proceedings should be taken on the second bankruptcy notice until after May 1. On May 14 the third bankruptcy notice (No. 1329 of 1926) was issued for 857*l.* 3*s.* 4*d.*

and costs then remaining due, and on May 31, that notice was served on one of the debtors at 55 King's Road. It was not complied with, and therefore the act of bankruptcy became complete before June 24, when the petition was presented. The petition was based on the third bankruptcy notice.

In order that there should be an available act of bankruptcy s. 4, sub-s. 1 (*c*), of the Bankruptcy Act, 1914, must be complied with. That sub-section provides that "A creditor shall not be entitled to present a bankruptcy petition against a debtor unless . . . . (*c*) the act of bankruptcy on which the petition is grounded has occurred within three months before the presentation of the petition." It was not therefore possible to found the petition on the second bankruptcy notice, for the period of three months from March 10, when the act of bankruptcy was complete, had then expired, having come to an end on June 10.

It is said there was no service of the second and third bankruptcy notices sufficient to comply with the terms of the Act and Rules, but for the reasons which I have given I am of opinion that the service was a good service. We are not satisfied that the firm had ceased to carry on business or that the company had taken over its business. It therefore appears on the facts that the first appeal must fail. The petition was served in accordance with the rules, the Registrar's order was right and there is no ground for setting aside the service of the petition.

On June 24, 1926, the petition was presented, founded on the third bankruptcy notice. On July 28 a receiving order was made on the petition, the Registrar having refused on July 27 to set aside the service of the petition.

On this second appeal a different point is taken, and it is argued on behalf of the debtors that when the third bankruptcy notice was issued and served during the currency of the second notice, there was an available act of bankruptcy which prevented them from complying with the third notice. It is said that non-compliance with the third bankruptcy notice was necessary on their part. It appears to be a by no means

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uncommon practice to have more than one bankruptcy notice, leading to more than one act of bankruptcy, but it is said that there is a principle which gives the debtors the right to refuse to comply with a second bankruptcy notice while an earlier one is pending. There is no report of such a case. In *Ponsford, Baker & Co.* v. *Union of London and Smith's Bank* (1) Fletcher Moulton L.J., in delivering the judgment of the Court, said: "For the purpose of deciding this point it is necessary to examine carefully the exact legal position of a man who has committed an act of bankruptcy under the statutes at present in force. Until commission of the act of bankruptcy he was, of course, the beneficial owner of whatever assets he possessed, but by the act of bankruptcy his title to be regarded as such beneficial owner is no longer absolute, but is contingent on no bankruptcy petition being presented within three months of the date of the act of bankruptcy which leads to a receiving order being made. If such receiving order be made the whole of the assets vest in his trustee as from the date of the act of bankruptcy. He is, therefore, in the position that should such a contingency occur he is from the date of the act of bankruptcy something less than a mere trustee of his assets for the creditors in his bankruptcy. Until this state of suspense has been removed, either by a receiving order or by lapse of time, he has no right to deal with those assets that were in his hands, and can give no title in them to any transferee with notice."

It is said, applying that doctrine, that a debtor against whom there is an available act of bankruptcy cannot and ought not to comply with a subsequent bankruptcy notice, for if he did so he would be committing an offence in paying money away, as he has no right to deal with any assets which are in his hands.

But to deduce such an argument as this appears to me to place too wide an interpretation on the words of the judgment. The bankruptcy notice is to be in the form prescribed by s. 2 of the Bankruptcy Act, 1914, which provides: "A bankruptcy notice under this Act shall be in

(1) [1906] 2 Ch. 444, 452.

the prescribed form, and shall require the debtor to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order, or to secure or compound for it to the satisfaction of the creditor or the Court, and shall state the consequences of non-compliance with the notice, and shall be served in the prescribed manner."

In my opinion the words of Fletcher Moulton L.J. do not suggest that it is illegal for the debtors in this case to comply with the third bankruptcy notice, and therefore they cannot rely on the existence of a previous act of bankruptcy as justifying them in their refusal to comply with the notice.

In *In re G. E. B.* (1) a debtor claimed that he ought not to be compelled to comply with a bankruptcy notice, because if he did he would lose a right of set-off against the very debt which was the foundation of the bankruptcy notice, but which he could not set up in his defence in the action in which the judgment was obtained. The Court felt the difficulty and the hardship that would be involved if the debtor was compelled to pay, but Vaughan Williams L.J. said that you must have regard to the terms of s. 4, sub-s. 1 (*g*), of the Act of 1883, and see whether there is an effective right of set-off at the time, and not merely an inchoate right, and whether that time is within the seven days allowed by the bankruptcy notice.

When this third bankruptcy notice was issued there was no right on the part of the debtors to refer to their previous bankruptcy notice, and to refuse to comply with the later one. The appeal therefore fails and must be dismissed. The result is that there was an act of bankruptcy which was complete on June 8. The application to set aside the receiving order therefore fails.

SARGANT L.J. I am of the same opinion on both points. There was ample material on which the Registrar could come to the conclusion that the company was a mere sham and a blind. The partnership was being carried on without reference to the assignment to the company. The wages were

(1) [1903] 2 K. B. 340.

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paid by the partners and the receipts from sales divided between them. The first appeal must therefore be dismissed.

The second appeal raises a question that is said never to have been actually decided, or at any rate reported, and the decision of which in favour of the appellants would have very far-reaching effects in bankruptcy practice.

It is argued that the third bankruptcy notice was bad here, because of the existence at the time of an alleged act of bankruptcy through non-compliance with the second bankruptcy notice. It is said that this pendency and the possibility that the debtors might be adjudicated bankrupt under the earlier, i.e. the second bankruptcy notice, rendered it unlawful for the debtors to pay in compliance with the later notice, and therefore that it would be wrong to penalize a non-compliance with the notice by proceeding to adjudicate them bankrupt. And to show the illegality involved in the bankrupts employing their assets in discharge of the debt forming the subject-matter of the earlier bankruptcy notice reference is made to the judgment of Fletcher Moulton L.J. in *Ponsford, Baker & Co.* v. *Union of London and Smith's Bank.* (1)

Now if this contention is correct it obviously must apply to the giving of a later bankruptcy notice whenever an earlier bankruptcy notice has been given and has not been complied with, whether that earlier notice has been given by the same or a different creditor. And the result would be to stultify subsequent bankruptcy notices and petitions given and presented after notice of a previous bankruptcy notice that might still be available, or indeed of any available act of bankruptcy prior to that relied on in the subsequent notice or petition. Further, it would involve this striking result, that it would be quite illegal and improper at any time, however short, after the expiry of a bankruptcy notice to pay the creditor giving such notice the whole or any part of his debt. For it might of course be that any other creditor might subsequently take advantage of the act of bankruptcy involved in not paying the debt in compliance with the notice. It is hardly too much to say that a decision in favour of this

(1) [1906] 2 Ch. 444, 452.

contention of the appellants would revolutionize the general practice in bankruptcy.

Is it, then, possible to give any less sweeping interpretation of the language of Fletcher Moulton L.J. in the case above referred to than that suggested by the appellants' counsel here? In my judgment, when the remarks of the Lord Justice are carefully examined in the light of the circumstances of the case, it will be seen that he was there dealing with the question, not whether interim payments of the kind in question were absolutely prohibited, but with the much narrower question as to the extent of the title conferred on the recipients of such interim payments. He was pointing out that the debtor could not give his creditor any better title than he had himself, that is, a title liable to be avoided by a bankruptcy dating back to a date anterior to the payment—a contingent, or rather perhaps a defeasible title. In the present case a payment made in pursuance of the third bankruptcy notice would have left the petitioning creditors liable to repay should the bankruptcy be so dated back, and there would, of course, be involved the hardly appreciable risk to the estate of the petitioning creditors proving unable to make repayment. But it does not follow that such a payment to the petitioning creditors would be illegal. I cannot see that it is prohibited by the statute, either expressly or impliedly. The present case is quite different from that of *In re Follows* (1), in which it was held that where goods taken in execution under a judgment had been claimed by a third party before the sheriff had made a return, and an interpleader summons had been taken out, and was pending, the judgment creditor was not in a position to levy execution for the amount of the judgment debt, and therefore was not entitled to serve a bankruptcy notice on the judgment debtor.

If, while an earlier bankruptcy notice were still available for a petition, a second notice were given in bad faith or to embarrass the debtor, the Court could prevent oppression by declining to act. But in my view there has been nothing of this sort here. The first bankruptcy notice had been withdrawn,

(1) [1895] 2 Q. B. 521.

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objections had been taken to the second notice which had not been conclusively satisfied, and I think that the third notice was served to escape from those objections, and to place the petitioning creditors in a stronger and less challengeable position than they had previously occupied. The failure to comply with this third notice was attributable not to the existence of the second notice, but to the entire inability of the debtors to pay the remainder of their debt. The petitioning creditors have complied with the statutory formalities necessary to establish the insolvency of the debtors ; and I see no sufficient reason for refusing the statutory consequences of the insolvency so established.

LAWRENCE L.J. I agree, and do not think I can usefully add anything to what has been said by the Master of the Rolls and Sargant L.J.

Appeals dismissed.

Solicitors for appellants : *Pollock, Booth & Addis.*
Solicitors for respondents : *Langford & Redfern.*

W. I. C.

C. A. 1926 ASTBURY J. *March* 18, 19, 22, 23 ; *July* 23. C. A. *Nov.* 4, 5.

In re MUNTON.

MUNTON *v.* WEST.

[1923. M. 1789.]

Trustee—Breach of Trust—Loss of Trust Fund—Liability—Wide Power of Attorney to Brokers—Advice of independent Solicitors—Brokers without Authority paying Money to Trustee—Solicitor lodging the Power—Misappropriation by Trustee-solicitor—Indemnity Clause—Trustee Act, 1893 (56 *&* 57 *Vict. c.* 53), *s.* 24—*Trustee Act,* 1925 (15 *Geo.* 5, *c.* 19), *s.* 30.

Shortly after the appointment of a new trustee in place of a retiring trustee of a sum of War Stock inscribed in the names of the old trustees, the retiring trustee with the advice of her own independent solicitors joined with her two co-trustees, one of whom was a solicitor acting for the trust, in executing a joint power of attorney authorizing named brokers to sell and transfer all or any part of the stock and to receive the consideration money.

This sale and transfer power was signed in lieu of an ordinary transfer power in order that certain trust costs might be raised and

paid before the fund was transferred to the new and continuing trustees.

The power of attorney was, with the solicitors' approval, handed to the solicitor-trustee, who lodged it with the brokers. By his instructions they sold the whole fund, and, without any authority from the retiring trustee, handed him the proceeds in cash and bearer bonds, which he forthwith misappropriated.

Neither the retiring trustee nor her solicitors, though fully aware that the solicitor-trustee was a dilatory and incompetent muddler, had the remotest suspicion that he was dishonest :—

Held, by Astbury J., in the circumstances, that the retiring trustee having acted with the advice of independent responsible solicitors, was not guilty of any breach of trust in signing the power of attorney.

Hanbury v. *Kirkland* (1829) 3 Sim. 265 and *Underwood* v. *Stevens* (1816) 1 Mer. 712 distinguished.

Whether the brokers were responsible for exceeding their authority under the power, *quaere*.

Whether the statutory indemnity clause contained in the Trustee Act, 1893, s. 24 (now replaced by the Trustee Act, 1925, s. 30), which practically exonerates a trustee for loss unless it happens through his own wilful default, adds anything to a trustee's protection against liability or is merely declaratory, *quaere*.

Semble, however, that since the decision of Romer J. and the Court of Appeal in *In re City Equitable Fire Insurance Co.* [1925] Ch. 407, 434, 525 a trustee is not guilty of wilful default unless he is conscious that his act or omission is a breach of duty, or recklessly careless on the point.

On appeal :—

Held (affirming the decision of Astbury J.), that in the circumstances the retiring trustee committed no breach of trust in signing the power of attorney, and that being so and the power of attorney containing no authority to the attorneys to pay the money to the solicitor-trustee the retiring trustee was not responsible for the loss resulting from his fraudulent misappropriation of the trust fund.

WITNESS ACTION.

By her will dated October 30, 1913, Elizabeth Ann Munton, after appointing her daughter Mrs. West (then a spinster), Coffin, and her solicitor Tucker executors and trustees, and bequeathing certain pecuniary legacies, devised and bequeathed her property to them upon trust for sale and conversion. After making certain pecuniary and specific bequests the testatrix directed her executors and trustees to set aside out of her residuary estate a sum of 5000*l.* to be invested in their joint names in the investments therein mentioned, and to pay or apply the income on a discretionary trust for the benefit of the plaintiff Ernest Munton and his two infant

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children, the plaintiffs Arthur Munton and Betty Munton, and after Ernest Munton's death to hold this 5000*l.* trust fund in trust for Arthur and Betty in equal shares, Arthur's share to vest at twenty-five, and Betty's share to be settled as therein mentioned. On the failure of all the trusts the fund was to fall into residue, of which one moiety was given to Mrs. West and the other moiety settled on another daughter.

The testatrix died on November 28, 1913, and on February 20, 1914, her will was proved by all three executors.

Tucker, who acted in the administration of the estate, was not only very dilatory but he did not keep proper accounts, and Mrs. West became dissatisfied in this respect. She also became dissatisfied in another matter. On March 25, 1911, in her mother's lifetime she had made a revocable voluntary settlement of a reversion on her mother's life, appointing Tucker sole trustee. In 1914 he received 3650*l.* on this account, and invested it in very hazardous personal securities.

In May, 1915, Mrs. West, having lost all confidence in Tucker, put her affairs into the hands of Radford & Frankland, and revoked the voluntary settlement. After considerable trouble and threats of proceedings Radford & Frankland obtained payment of Mrs. West's 3650*l.* in thirty-four instalments from July 5, 1915, to October 22, 1918, and secured the opening of a trust banking account in February, 1917. With further trouble and some litigation they also secured the proper setting aside and investment of the 5000*l.* trust legacy by instalments ending on December 29, 1920. The investment consisted of 5741*l.* 5 per cent. War Stock inscribed in the names of the three trustees.

In July, 1922, Mrs. West desired to retire from the trusteeship of this trust fund, and it was arranged that Manley, an articled clerk, should take her place. As she had gone to live at Exmouth in 1921, she instructed local solicitors, Orchard & Son, to act for her in this matter. Manley & Lawson (his father's firm) acted for Manley, and Tucker for Coffin and himself.

The retirement of Mrs. West and the appointment of Manley in her place were duly effected by a deed of August 28, 1922, containing a recital that the trust fund was represented by 5741*l.* 5 per cent. War Stock in the names of Mrs. West, Coffin, and Tucker, and that it was intended to transfer the security forthwith into the names of Coffin, Tucker, and Manley.

It was originally intended to transfer the fund direct to the new and continuing trustees by an ordinary transfer power of attorney, but on Tucker pointing out that certain trust costs required to be raised, a sale and transfer power was substituted, so that sufficient stock could be sold to pay those costs and the residue transferred. Tucker having bespoken a sale and transfer power sent it to Orchard & Son on September 15, 1922. On their advice it was executed by Mrs. West on September 21, and returned to Tucker, who obtained Coffin's signature and added his own.

This power appointed two named brokers attorneys in the names of the three old trustees to sell and transfer all or any part of the 5741*l.* War Stock and to receive the consideration money and give receipts for the same.

About September 24, 1922, Tucker lodged the power with the brokers, who, by his instructions, on September 25 sold the whole 5741*l.* War Stock for 5707*l.*, applying 3300*l.* part thereof in the purchase of 3300*l.* War Loan Bearer Bonds, and handing them and a cheque for the 2407*l.* balance to Tucker on September 26. Shortly after this Tucker misappropriated the whole fund.

Being unaware of this fraud both Mrs. West's and Manley's solicitors continued to press Tucker to have the fund properly transferred, but were put off with various excuses, e.g. difficulty in ascertaining the amount of the costs requiring to be raised. The misappropriation was not in fact discovered until May, 1923. On July 18, 1923, Tucker was convicted of fraudulent conversion of this and other trust funds, and on July 31 he was adjudicated a bankrupt.

On June 5, 1923, the plaintiffs commenced this action against Mrs. West, Coffin, Tucker and Manley for replacement

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of the fund, Tucker's trustee in bankruptcy being subsequently added by amendment. The trustees' bank was originally made a defendant, but proceedings were stayed against it.

As against Mrs. West and Coffin the plaintiffs alleged that upon their execution of the power of attorney it became their duty to take all steps requisite to secure that the proceeds of sale thereby authorized were duly invested in the joint names of Mrs. West, Coffin, and Tucker or in the joint names of Coffin, Tucker, and Manley, and that they wrongfully and in breach of that duty neglected to take any such steps.

As against Manley they alleged that on his appointment as trustee it became his duty to take all steps requisite to ensure that the trust fund was transferred into the joint names of Coffin, Tucker, and himself, and that wrongfully and in breach of that duty he had neglected to take any such steps.

Mrs. West and Coffin denied that they had committed any breach of trust or duty, and pointed out that the power of attorney did not authorize any payment of the proceeds of sale to Tucker, and that they were not responsible for their brokers' acts. Manley also denied any breach of trust or duty. These three defendants relied on the Judicial Trustees Act, 1896, s. 3, now replaced by s. 61 of the Trustee Act, 1925. Tucker did not put in a defence.

On the case being opened and the pleadings read it was admitted that the primary onus was on the defendants Mrs. West and Coffin. Their case was therefore first opened, and then that of Manley for convenience.

The action came on for hearing before Astbury J. on March 18, 1926.

Topham K.C. and *Wilfrid Hunt* for Mrs. West. The delegation to brokers by a power of attorney is every day practice on the appointment of a new trustee, and in this case a sale and transfer power was necessary to enable the costs to be paid and the fund cleared before the transfer.

The power did not, of course, authorize payment of the proceeds to Tucker or any one else, and the brokers ought to have obtained the old trustees' directions as to this. Acting without any authority they paid the proceeds to Tucker. For this act they, and not Mrs. West, are responsible.

The Trustee Act, 1925, is material on this point. Sect. 30, which, notwithstanding Underhill on Trusts, 8th ed., p. 507, is with immaterial exceptions a replica of s. 24 of the repealed Trustee Act, 1893, provides that a trustee shall be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, "and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust money or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default."

Now a person is not guilty of "wilful neglect or default" unless he is conscious that in doing the act complained of, or in omitting to do the act that he ought to have done, he is committing a breach of his duty, or recklessly careless whether his act or omission is a breach of duty or not: *In re City Equitable Fire Insurance Co.* (1) In the present case, although Mrs. West and her solicitors knew that Tucker was a dilatory muddler, they had not the remotest suspicion that he was dishonest, or that there was any ground for removing him. Acting under her solicitors' advice she appointed a new trustee on her retirement and signed the power of attorney, believing that it would be honestly used. This was not a breach of trust.

If, however, the Court thinks that Mrs. West ought in the special circumstances to have taken extra precautions to prevent Tucker getting hold of the fund she relies on s. 61 of the Trustee Act, 1925, which replaces s. 3 of the repealed Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), and provides that if it appears to the Court that a trustee is or may be

(1) [1925] Ch. 407, 434, 525.

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personally liable for any breach of trust occurring before or after the commencement of this Act, " but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust," the Court may relieve him from personal liability.

Coffin in person adopted the same argument.

Bennett K.C. and *Alfred Adams* for Manley pointed out that he had nothing to do with the power of attorney, which in fact he never saw, and that he and his father's firm had continuously pressed for a transfer of the funds, which could not strictly be made before his appointment: Key & Elphinstone's Precedents, 11th ed., vol. i., p. 133n.

Archer K.C. and *J. H. Boraston* for the plaintiffs. With her knowledge of Tucker's unbusinesslike ways and the difficulty of getting money out of him, Mrs. West ought not to have signed this unnecessarily wide sale and transfer power of attorney: *In re Gasquoine.* (1) It is true that it does not expressly authorize payment to Tucker, but in practice, as she must have known, brokers, unless specially instructed to the contrary, invariably pay the solicitor who lodges the power. We are in fact advised that this practice is so well settled that no liability attaches to the brokers. In any case it cannot excuse Mrs. West, who by enabling an irresponsible trustee to get possession of the fund has unnecessarily exceeded the powers of delegation set out in Underhill on Trusts, 8th ed., p. 303.

[ASTBURY J. She knew that Tucker was a muddlehead, but had no suspicion that he was a scoundrel. Was she consciously committing any breach of duty in signing this power of attorney on her solicitors' advice? *In re City Equitable Fire Insurance Co.* (2)]

That case is very far removed from the present. It was dealing exclusively with the duties of directors and auditors and their immunity under a special indemnity contract contained in art. 150. (3) The distinction between those company officers and ordinary trustees is insisted on throughout (4), and the ordinary trustee indemnity clauses, statutory

(1) [1894] 1 Ch. 470.
(2) [1925] Ch. 407, 434, 525.
(3) [1925] Ch. 413.
(4) [1925] Ch. 426, 524, 530.

or otherwise, are not referred to in the five-page headnote (1), which is expressly confined to the meaning of " wilful neglect or default " in art. 150.

It is true that the liquidator attempted to limit art. 150 by the decisions that the ordinary trustee indemnity clauses and their statutory incorporations are merely declaratory. But that attempt failed, and art. 150 was construed as an ordinary business contract by the light of decisions on other business contracts, such as vendor and purchaser contracts, railway carriage contracts, and an indemnity clause in a company's mortgage debenture trust deed. Nothing can have been further from the mind of the Court than any idea that they were construing an ordinary trustee indemnity clause and upsetting the law from the time of Charles the First onwards.

Now what was that law ? It goes back to *Townley* v. *Sherborne* (2) and *Brice* v. *Stokes* (3), and is conveniently summarized in Lewin on Trusts, 12th ed., pp. 294–296. Broadly speaking a trustee was not liable for the acts of his co-trustee unless he himself was guilty of dolus malus, evil practice, fraud, or ill intent in permitting his co-trustee to receive the whole profits. This law, for the convenience of trustees, was often declared by the ordinary trustee indemnity clause, and was successively codified by Lord St. Leonard's Act, i.e., the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), s. 31 ; the Trustee Act, 1893, s. 24 ; and now by the Trustee Act, 1925, s. 30. But these indemnity clauses and codifications were merely declaratory of what equity already implied, and added nothing to the trustees' immunity : see Lewin on Trusts, 12th ed., p. 304. (4)

On the old law Mrs. West, knowing what she did, is clearly liable for signing this wide power of attorney : *Hanbury* v. *Kirkland* (5) ; *Underwood* v. *Stevens*. (6) Her solicitors, who

(1) [1925] Ch. 407–411.

(2) (1633) Bridg. Rep. 35 ; 2 White & Tudor, 8th ed., p. 627.

(3) (1805) 11 Ves. 319 ; 2 White & Tudor, p. 631.

(4) See also 3 Davidson's Precedents, 3rd ed., part 1, pp. 246–249 ; 9 Bythewood & Jarman's Precedents, 3rd ed., p. 726 : 11 ibid., p. 904.

(5) 3 Sim. 265, 271.

(6) 1 Mer. 712, 716.

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advised on the imperfect information she gave them, are not liable: *Barnes* v. *Addy* (1), but that does not excuse Mrs. West. Coffin made no independent inquiries but simply signed this wide power on Tucker's request and left everything to him. He is also liable.

As against Manley, who never saw the power and who does seem to have pressed for a transfer, the case is not so strong, and if the Court is satisfied with his evidence we cannot press for an order against him.

ASTBURY J. [after stating the facts:] I will deal with Manley first. It is not suggested that he was not a perfectly proper person to be appointed a trustee in place of Mrs. West. His appointment on August 28, 1922, was in a form unfortunately very common. He was appointed a new trustee, but no simultaneous steps were taken to vest the trust funds forthwith in him and his two co-trustees. He acted with the advice of his father's firm, a perfectly respectable firm of solicitors, and directly after his appointment steps were taken to obtain the proper transfer of the trust funds. But this was too late. The funds had been misappropriated within two or three days after the execution of the power of attorney by the three old trustees, and there is no ground for charging Manley with any breach of trust for which he ought to be made liable.

Coffin was one of the original trustees. He was informed that Mrs. West was retiring and that Manley was being appointed in her place. Without knowing that there was anything wrong about Tucker, the solicitor-trustee appointed by the testatrix, Coffin executed the power of attorney when put before him by Tucker, acting on Tucker's advice, which he believed to be proper and trustworthy. I am unable to find that he was guilty of any breach of trust for which he ought to be held responsible.

The main difficulty is as to Mrs. West. She is not on speaking terms with her brother, the plaintiff Ernest Munton. She knew that Tucker was, as far as she could judge, a most

(1) (1874) L. R. 9 Ch. 244.

undesirable person to be entrusted with trust moneys. She had lost all confidence in him, and had to bring an action against him to obtain the proper investment of the plaintiffs' fund and threaten proceedings in order to obtain the moneys belonging to her personally in reversion on her mother's death. For this she deserves credit. After this she went to live at Exmouth, and wishing to retire from the trust she instructed local solicitors, Orchard & Son, to act for her. If she took the proper steps to retire and appoint a new trustee she would not have committed any breach of trust. Knowing what she did about Tucker, there were many steps she could have taken to prevent the loss of the trust money, but unless the omission to take those steps amounted to a breach of trust, which in my opinion is not the case, the plaintiffs are not entitled to make her liable in that respect.

Mrs. West says that she instructed Orchard & Son on Frankland's advice, and acted throughout on their advice. She told them that she had had endless difficulties with Tucker and thought he was a muddler. She was cross-examined with the view of showing that her opinion of Tucker was something worse. She was not a candid witness and fenced with the questions put to her, but, allowing for all that, I am satisfied that her belief with regard to Tucker was that he was a muddleheaded person who had given her a serious amount of trouble in connection with this trust, and she thought she would rather have nothing more to do with him. She did not know (and this I find as a fact) that Tucker was a dishonest man. Indeed, at that time I do not think that either she or her solicitors had any sufficient grounds for holding or believing that Tucker was dishonest, but only that he was a person who by muddling and incompetence was an extremely undesirable person to be a trustee. He was, however, the trustee appointed by Mrs. West's mother, and I have come to the conclusion that by retiring from this trust, so long as she obtained the appointment of an honest and proper trustee in her place, she was not guilty of any breach of duty for which she can be held responsible in allowing

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the trust moneys to remain partly under the control of Tucker as a continuing trustee.

The correspondence between Tucker and Orchard & Son makes it clear that Tucker informed Orchard & Son of the fact that there were certain trust costs to be paid. It would have been a simple thing to have transferred the War Stock to the new trustees and let them pay the costs, but it was not a breach of trust to allow the fund to be cleared before transfer. Tucker informed Orchard & Son that this was to be done, and sent them the power of attorney for them to obtain Mrs. West's signature. It was an ordinary sale and transfer power, to be signed by the three holders. It authorized the brokers to sell and transfer all or any part of the stock, but it did not authorize them to pay the proceeds to any one holder.

I am told that where a power of attorney of this kind is signed by trustees, it is not unusual for the brokers to hand the proceeds of sale to the trustees' solicitor who lodges the power with them. This is a most unfortunate practice, but as far as Mrs. West and her solicitors are concerned I cannot see that in signing or advising the signature of this power of attorney they were consciously signing or advising the signature of a document enabling Tucker to get possession of the trust fund. Whether the brokers instructed to sell on behalf of the three stockholders are responsible for handing the proceeds to one of them without the consent of the other two is not for me to determine. I have merely to decide whether in the circumstances Mrs. West's signature to this power of attorney was a breach of duty. Now notwithstanding what I have said about her evidence and the fact that her only object was to free herself from the trust, I am of opinion that having acted with the consent and advice of her own solicitors she was not in the circumstances guilty of a breach of duty in signing this power of attorney.

The plaintiffs contend that this is not the proper view, but that the question is: "Did Mrs. West take the same care of the plaintiffs' money as she would have taken of her own?" They say she did not, and that her knowledge of

Tucker raised in her a special duty to see that he did not obtain possession of the trust fund, that she took no care to prevent this, and did not sufficiently put Orchard & Son upon their guard against Tucker. In a sense there is something to be said for this contention, but on the whole I am of opinion that she was entitled to retire if she obtained the appointment of a proper trustee in her place. That she did. She was entitled to take the necessary steps to clear the fund of costs before transfer. She signed what is unfortunately a common form power of attorney. She did not know that Tucker was dishonest in the sense that he could not be trusted to act properly in the matter for a few days in connection with handing over the trust fund balance to the new trustees. She acted under the advice of competent solicitors, to whom she had told her opinion of Tucker, and the only steps she took were what they told her were the proper steps in the circumstances.

As to the numerous authorities, the matter stands thus. A trustee must not delegate his duties or powers (or a fortiori the receipt of trust moneys) either to a stranger or to his co-trustee, unless authorized by the settlement, except in certain cases, one exception being that he may employ or pay an agent to transact any business or to do any act required to be done in the execution of the trust, including the receipt and payment of trust money, without being responsible for the default of any such agent if employed in good faith : see Underhill on Trusts, 8th ed., p. 303.

Here Mrs. West employed the brokers to transact a proper operation in connection with this trust, and she did not authorize them nor was she party to any act authorizing them to hand over the money to Tucker.

For many years past the ordinary trustee indemnity clause has been incorporated in successive statutes. For example, s. 24 of the Trustee Act, 1893, provides that a trustee shall be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects,

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or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust moneys or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, " unless the same happens through his own wilful default."

There are possibly two questions under that clause. First, was Mrs. West guilty of neglect in respect of any act of hers which enabled Tucker to get possession of and appropriate this trust fund ? The answer is that in the circumstances she was not so guilty. Secondly, was she guilty of any wilful default in connection with this power of attorney ? Again I think she was not guilty. The indemnity clauses, containing the exception of wilful default, in the Trustee Acts may or may not have added anything to the previous law, but in *In re City Equitable Fire Insurance Co.* (1) the whole question of wilful default as regards a fiduciary agent is dealt with at great length. Warrington L.J. says (1) : " Romer J. was quite right in arriving at the conclusion that a person is not guilty of ' wilful neglect or default ' unless he is conscious that in doing the act which is complained of, or in omitting to do the act which it is said he ought to have done, he is committing a breach of his duty, and also, as he said, recklessly careless whether it is a breach of duty or not." There are many other passages to the same effect.

Now I am unable to find that Mrs. West acting under the advice of her solicitors committed any act that she was conscious was a breach of duty on her part ; nor can I hold that in the circumstances, especially having regard to the fact that she was acting under her solicitors' advice, she was recklessly careless whether what she did was a breach of duty or not.

The plaintiffs' counsel say that the *City Equitable* case (1) has made no change in the law as regards an ordinary trustee's liability. I do not propose to discuss that. I have read the passage representing the general result of the decision, and it seems to me to apply to the present case.

(1) [1925] Ch. 407, 434, 525.

In Lewin on Trusts, 12th ed., pp. 294–296, it is accurately stated that one trustee shall not be liable for the acts or defaults of his co-trustee unless "upon the proofs or circumstances the Court should be satisfied that there had been any dolus malus, or any evil practice, fraud, or ill intent in him that permitted his companion to receive the whole profits."

Now in my judgment this does not apply to Mrs. West at all. She did no act consciously intending that Tucker should receive anything, and still less was she guilty of any malpractice or breach of trust in following her solicitors' advice in the circumstances.

At p. 304 Lewin says: "Formerly an express clause was inserted in trust-deeds, that one trustee should not be answerable for the receipts, acts, or defaults of his co-trustee. But the proviso, while it informed the trustee of the general doctrine of the Court, added nothing to his security against the liabilities of the office. . . . . But equity infuses such a proviso into every trust-deed, and a person can have no better right from the expression of that which, if not expressed, had been virtually implied."

Whether that is right or not, the Trustee Act, 1893, s. 24, is express, and the *City Equitable* case (1) renders its meaning perfectly clear.

The plaintiffs rely on two authorities which at first sight seem to bear directly on the present case.

In *Hanbury* v. *Kirkland* (2) one of three trustees informed his co-trustees that he had an opportunity of investing the trust property in a 5 per cent. mortgage, and he requested his co-trustees to execute a power of attorney to himself to enable him to transfer the trust stock on the mortgage security being completed. The co-trustees, without inquiring into the matter, complied. The trustee sold the stock and absconded, and it was held that the trustees who signed the power of attorney were responsible. Shadwell V.-C. said: "The trustees, without further inquiry, without exercising a single act of discretion, execute the power of attorney."

(1) [1925] Ch. 407, 434, 525. (2) 3 Sim. 265, 271.

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The facts there were quite different from the present case. The power of attorney was given to the co-trustee himself. The persons executing it had no knowledge and made no inquiry as to the circumstances, and, what is most important, they did not act in the matter with the assistance and advice of their own solicitor, but merely accepted the representations of the wife's solicitor, the defaulting trustee. Even assuming that *Hanbury* v. *Kirkland* (1) is still good law, it does not apply to the present case, where the facts are entirely different.

In *Underwood* v. *Stevens* (2) one of two executor-trustees not having acted otherwise than by joining with his co-executor-trustee in sales of stock, under false representations that the sales were necessary for the payment of debts and legacies, was held liable for the balance not actually applied to the trust purposes. Sir William Grant M.R. said that a considerable sum of money had been lost owing to the defendant Smith's suffering the stock to get into the possession of his co-executor-trustee.

There again the facts were entirely different. In this case Mrs. West did not do any act the natural result of which enabled or authorized Tucker to get possession of this trust fund.

In the result, difficult perhaps as Mrs. West's case may be, I am of opinion that neither she, Coffin, nor Manley is responsible for any breach of trust in the circumstances. There will be judgment against Tucker, but against the defendants West, Coffin, and Manley the action will be dismissed.

[The plaintiffs subsequently applied on notice of motion for judgment in default of defence against Tucker and his trustee in bankruptcy, against whom no previous notice of motion for judgment had been issued. On July 23 the Court made the same order as before, directing the whole order to be post-dated.]

G. R. A.

C. A. The plaintiffs appealed. The appeal was heard on November 4, 5, 1926.

(1) 3 Sim. 265, 271. (2) 1 Mer. 712, 716.

The appellant Ernest Munton in person. I brought this action against the original trustees and the new trustee on the ground that when they executed the power of attorney in September, 1922, to the bank it was their duty to see what became of the proceeds of sale. Tucker alone received the money and they did not within a reasonable time make inquiries about it. Tucker disposed of it all in four days. Mrs. West had recovered judgment against Tucker before Astbury J. on November 18, 1920, ordering Tucker to pay the money then in dispute, and after that Mrs. West should not have trusted him at all. A trustee must show good faith and exercise reasonable care, and that involves the exercise of "active discretion" on his part, and he will therefore be liable for loss arising from his supineness or carelessness: *In re Greenwood* (1), and where he allows his co-trustee to receive the trust property without making due inquiry as to his dealing with it, he will be liable: *Marriott* v. *Kinnersley* (2); Underhill on Trusts, 8th ed., p. 505.

[SARGANT L.J. But you have to establish first that there was a breach of trust.]

They committed a breach of trust by executing a wrong power of attorney. It should have been a power to transfer the stock, not to sell it. They also knew that Tucker was dishonest and not to be trusted.

[LORD HANWORTH M.R. Your difficulty is that the whole case is coloured for you now by the fact that Tucker proved to be dishonest. The other trustees did not know that then.]

They were liable for leaving the money in Tucker's hands far longer than was reasonable: *In re City of London Insurance Co.* (3), and without inquiry: *In re Turner* (4); Underhill on Trusts, 8th ed., pp. 490, 491.

[LAWRENCE L.J. What duty was there on Mrs. West after she had executed the power and retired from the trust to see what happened to the funds?]

She executed the wrong power—for sale instead of transfer.

(1) (1911) 105 L. T. 509.
(2) (1830) Taml. 470.
(3) (1925) 41 Times L. R. 521.
(4) [1897] 1 Ch. 536.

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It was a breach of trust on the part of the trustees to execute the power of attorney at all: *Marriott* v. *Kinnersley*. (1) A trustee does not finish his duty as trustee by signing a power of attorney: *In re City Equitable Fire Insurance Co.* (2) Here Mrs. West signed the authority to the brokers, and it was her duty to see what they did with it. She did not do what she ought to have done. By reason of their inactivity both Mrs. West and Coffin were liable for breach of trust.

[LORD HANWORTH M.R. The effect of the decision of Astbury J. is that Mrs. West did not know that Tucker was a dishonest person.]

Here Mrs. West knew that Tucker was a muddler, and she ought therefore to have taken proper precautions.

Topham K.C. and *Wilfrid Hunt* for Mrs. West. As a result of the action brought by Mrs. West against Tucker not only was her own fund recovered, but the trust fund was properly invested. It is submitted (1.) that the action of Mrs. West in signing the power of attorney did not lead to the loss of the fund; (2.) that if there was no wilful default on her part she is not responsible for that loss; and (3.) that s. 61 of the Trustee Act, 1925, which enables the Court to relieve a trustee if he has acted reasonably, applies. Here Mrs. West, thinking Tucker was a muddler, went to a separate firm of solicitors. The form of the power of attorney in no way authorized the brokers to hand over the money to Tucker alone. They took the risk of trusting him personally. The rule is that where there are two or more trustees one alone cannot give a good discharge for purchase-money: *In re Flower and Metropolitan Board of Works*. (3) We rely on that case as showing that even if the authority given was to pay to one that would not be a sufficient authority. It was not the natural result of the power of attorney that the money should be paid to Tucker. Within three or four days of the payment the money was gone. The judge was right in holding that there was no breach of trust by Mrs. West in what took place.

(1) Taml. 470. (2) [1925] Ch. 407.
(3) (1884) 27 Ch. D. 592, 595.

On the main ground, therefore, it is submitted that the judgment of Astbury J. was right.

[They were stopped.]

The respondent Coffin in person.

LORD HANWORTH M.R. This appeal comes before us from a judgment of Astbury J. In the action as originally constituted Mr. Munton appeared for himself and as next friend of one of his children. The action was brought against Mrs. West, a sister of the plaintiff, Mr. Charles Hayden Coffin, Mr. Tucker and Mr. Manley as trustees of the will of the plaintiff's mother, and to these defendants has been added the trustee in bankruptcy of the defendant J. E. Tucker, who is a bankrupt. The action was brought charging the trustees breaches of trust.

The action is indeed a sorry one, arising as it does from the default and dishonesty of the defendant Tucker, a solicitor, who was held in esteem by the other trustees.

The story is as follows. Mr. Munton is entitled to a life interest in a sum of 5000*l.* under the will of his mother, Mrs. Munton. Tucker acted in a dilatory and incompetent manner. In September, 1922, Mrs. West was anxious to retire from the trust and to be replaced by Mr. Manley. In order to discharge the old trustee and to place the fund in the names of the continuing trustees and the new trustee it was necessary that a transfer of the fund should be executed. Accordingly a form of power of attorney to brokers to sell and transfer was obtained by Tucker, who was one of the original trustees of Mrs. Munton's will.

Among the various forms of power of attorney one was selected by Tucker which enabled the attorneys to sell the whole fund, it being stated by him that there were certain trust costs to be paid the amount of which had not then been ascertained, but which must have been relatively small compared with this sum of 5000*l.* War Stock. Tucker alone knew the total amount of these costs. The power of attorney was obtained by Tucker and submitted by him to Mrs. West and the other trustees of the will for execution. Mrs. West

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had full confidence in her solicitors, Orchard & Son, who were advising her in the matter, and Mr. Coffin in Mr. Tucker, the solicitor to the trust.

It is said as against Mrs. West that the execution by her of the power was a breach of trust. Mr. Munton appears in person as appellant, but he cannot appear for the other appellants. He has not presented any case against Mr. Manley.

Mrs. West had been trustee of the fund until September, 1922. She had some time before this become dissatisfied with Tucker's dilatoriness and incompetence, and had issued a writ against him for a complete account of the trust fund. Before that litigation Tucker had bought 4300*l.* War Stock in the names of the trustees. After the issue of the writ Tucker made further contributions to the fund. In the course of the action a four day order was made against Tucker to pay 290*l.* Those proceedings show that Mrs. West thought it necessary to take them. Tucker is now a convict and an undischarged bankrupt. In the Court below Mrs. West repeated her view that Tucker was a muddler and nothing more.

In my opinion it is impossible to set aside the finding of the judge that at this time in September, 1922, Mrs. West did not know that Tucker was a dishonest person, and, in those circumstances, it is impossible to hold that there was a breach of trust by either of the two trustees in signing the power of attorney in the form selected by Tucker. That really disposes of the case.

It is clear that when the sale was effected no authority was given to Tucker by the trustees to receive the money. It was received by him on his own initiative.

If there was no breach of trust in signing the power of attorney and no authority given to Tucker to receive the money, there is no breach of trust for which the trustees can be held responsible. The loss arose from the unauthorized getting into his hands by Tucker of the trust money.

This is not a case in which we have to grant relief under

s. 61 of the Trustee Act, 1925, because we hold that there was no breach of trust.

The question as to wilful default which was discussed in the *City Equitable* case (1) does not arise.

The appeal must be dismissed with costs.

SARGANT L.J. I am of the same opinion. It seems to me that the appeal fails on several grounds. In the first place, the appellant has, in my judgment, failed to show any breach of trust on the part of any of the trustees. *Speight* v. *Gaunt* (2) was a somewhat similar case to the present. The Court of Appeal there laid down in the strongest terms that a trustee investing funds is justified in employing a broker to procure securities authorized by the trust and in paying the purchase-money to the broker, if he follows the usual and regular course of business adopted by ordinary prudent men in making such investments. And see particularly the remarks of Lord Blackburn. (3)

I put aside the suggestion that Mrs. West had any reason for suspecting Tucker's honesty, or that she ought to have taken any special precautions. She thought that Tucker was merely a muddler; she did not think that he was fraudulent, and had no reason to suspect dishonesty in the particular transaction. And further in passing the power of attorney in the form in which it stood she acted under the advice of a separate firm of solicitors.

The power of attorney appointed two named brokers attorneys in the names of the three old trustees to sell and transfer all or any part of the 5741*l.* War Stock and to receive the consideration money and give receipts for the same. It may be that the transaction could have been carried out by a power of attorney limited to selling a small portion only of the stock. But she could hardly be under an obligation to alter the power in that way, and this alteration does not seem to have occurred to her solicitors, who had

(1) [1925] Ch. 407.
(2) (1883) 9 App. Cas. 1; (1883) 22 Ch. D. 727.
(3) 9 App. Cas. 20–22.

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no reason for suspecting the solicitor who had ordinarily acted in the trust.

Applying the principles laid down in *Speight* v. *Gaunt* (1), I hold that there was no breach of trust on the part of any of the trustees in signing the particular power of attorney. And at any rate there was no wilful default within s. 24 of the Trustee Act, 1893. Further, I am of opinion, that the loss of the money was the consequence not of the execution of the power of attorney in the form in which it stood but of the payment to Tucker alone. This the power of attorney did not authorize the brokers to do.

I have not, in the circumstances, to deal with s. 3 of the Judicial Trustees Act, 1896, or with s. 61 of the Trustee Act, 1925, because neither of the trustees has been guilty of a breach of trust against which any relief is necessary.

I agree that the appeal should be dismissed.

LAWRENCE L.J. I concur in the decision of the learned judge of the Court below that in the circumstances no breach of trust was committed by either of the trustees.

There is nothing to be found in the power of attorney which authorized the brokers to pay the money to Tucker.

I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *R. H. Blinkhorn; C. Butcher & Simon Burns; Taylor, Jelf & Co., for Orchard & Son, Exmouth; Russell-Cooke & Co.; Wigan, Champernowne & Prescott, for Locking, Holdich & Locking, Hull.*

(1) 9 App. Cas. 1; 22 Ch. D. 727.

W. I. C.

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[787 of 1925.]

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Nov. 19; *Dec.* 3.

Bankruptcy—General Power—Appointment by Deed—Subsequent Bankruptcy of Appointor—Appointment void against Trustee—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 38 (b); s. 42, sub-ss. 1, 4.

Sect. 42 of the Bankruptcy Act, 1914, which avoids certain settlements of property against the settlor's trustee in a subsequent bankruptcy is limited to settlements of a settlor's own property, or property in which he has a beneficial interest, and does not apply to settlements merely made in exercise of a general power of appointment.

Ex parte Gilchrist (1886) 17 Q. B. D. 521 applied.

Decision of Astbury J. reversed.

MOTION.

By a post-nuptial settlement dated December 12, 1924, and made between the husband, wife, and trustees in pursuance of ante-nuptial articles and an order of Court directing specific performance thereof certain properties belonging to the husband and wife respectively were assigned to the trustees upon the trusts thereinafter declared.

By clause 3 the trustees were to stand possessed of the husband's fund upon trust during the joint lives of the husband and wife to pay the annual income to the wife for her separate use without power of anticipation.

By clause 4 if the wife died first the trustees were to pay the income to the husband for life.

By clause 5, subject as aforesaid, the trustees should after the husband's death divide the husband's fund into two equal moieties—namely, moiety A and moiety B.

By clauses 6 and 7 the trustees were to hold moiety A after the husband's death upon trust to pay the income to the wife for life if she survived him for her separate use without power of anticipation and subject as aforesaid upon the usual trusts for the children of the marriage and in default of such children upon the trusts of moiety B.

By clause 8 the trustees were to hold moiety B upon trust for such persons as the husband should by deed or will appoint and in default of and subject to such appointment upon certain

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trusts for the husband's children and grandchildren by a former marriage and if no such child or grandchild attained a vested interest upon trust for the husband absolutely.

By a deed poll dated January 15, 1925, the husband irrevocably appointed that in case there should be no child of his present marriage who attained a vested interest the trustees should after the husband's decease stand possessed of the husband's fund upon trust for his wife absolutely.

On May 7, 1925, the husband committed an act of bankruptcy by non-compliance with a bankruptcy notice, and on May 29 a bankruptcy petition was presented. On August 5 a receiving order was made, and on August 26 the husband was adjudicated bankrupt. On August 28 a trustee was appointed.

On June 4, 1926, the trustee issued a notice of motion for a declaration that under and by virtue of s. 42 of the Bankruptcy Act, 1914, the deed poll including the appointment and settlement made thereby was void against the trustee, and for consequential relief.

There were as yet no children of the present marriage, which was solemnized on April 9, 1919.

The motion was heard before Astbury J. on October 18, 1926.

Archer K.C. and *W. F. Waite* for the trustee. The appointment of January 15, 1925, was a conveyance or transfer of a reversionary interest in property to the wife, a volunteer, and therefore void against the trustee under s. 42 which, omitting exceptions not applicable to the present case, provides (sub-s. 1) that any settlement of property shall, if the settlor becomes bankrupt within two years after the date thereof, be void against the trustee and (sub-s. 4) that " settlement " includes any conveyance or transfer of property.

If the husband had not exercised this general power, which was exercisable (inter alia) for his own benefit, the capacity to exercise it would have passed by statutory delegation to the trustee under s. 38 (*b*). Surely the husband could not deprive the trustee of his rights by an appointment, however bona fide, on the eve of his bankruptcy.

Clayton K.C. and *Hansell* for the wife. The motion is misconceived. The exercise of the general power was not a settlement of property within s. 42. Property as defined in s. 167 does not include power.

Sect. 38 (*b*) only applies to a power that the bankrupt could have exercised for his own benefit at the commencement of his bankruptcy or before his discharge. Here he had already irrevocably appointed to his wife absolutely, and his power was just as much gone as if he were dead, as in *Nichols* to *Nixey*. (1)

Power and property are quite distinct entities: Farwell on Powers, 3rd ed., p. 1; *Ex parte Gilchrist* (2); *Tremayne* v. *Rashleigh*. (3)

The wife ought not to be deprived of her property to pay the husband's bankruptcy creditors, unless the words of s. 42 clearly require it.

Archer K.C. in reply. Settlements are frequently made in exercise of a general power. Indeed the ordinary strict resettlement is almost invariably so made.

Ex parte Gilchrist (2) turned on the construction of s. 1, sub-s. 5, of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75). The Court held that a married woman's unexercised general power of appointment by deed or will was not her separate property within that sub-section, and having regard to s. 152 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), which provided that nothing therein should affect the Married Women's Property Act, 1882, it was not caught by s. 44, now s. 38 of the 1914 Act.

If, however, the exercise of the power stands, the husband's fund has become assets for payment of his debts: Farwell on Powers, 3rd ed., p. 286.

Clayton K.C. in rejoinder. The creditors in bankruptcy could not touch any such assets: *In re Guedalla* (4), following *Jenney* v. *Andrews*. (5)

(1) (1885) 29 Ch. D. 1005.
(2) 17 Q. B. D. 521, 526, 528, 531, 536.
(3) [1908] 1 Ch. 681, 688.
(4) [1905] 2 Ch. 331.
(5) (1822) 6 Madd. 264.

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ASTBURY J. [after stating the facts :] The trustee contends that the exercise of this general power by the deed poll of January 15, 1925, was a settlement of property within s. 42 and therefore void.

The wife contends that the motion ought to fail on various grounds. She first draws the well known distinction between property and power, and after rightly pointing out that a general power is not property in the ordinary sense, contends that therefore s. 42 does not apply. She also refers to the definition of property in s. 167, in which property naturally does not include a power.

But that does not in the least settle this matter. The real and only question for decision is whether a voluntary gift or settlement of property made in exercise of a general power is a settlement of such property within s. 42.

Under s. 38 the bankrupt's property (passing to his trustee) comprises (inter alia) (*b*) : " The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge, except the right of nomination to a vacant ecclesiastical benefice." It is plain therefore that if the bankrupt had not exercised this power it would have become exercisable by the trustee under s. 38 (*b*). It is also plain that this appointment could not have been attacked as a fraudulent conveyance, gift, delivery, or transfer of the bankrupt's " property " within s. 1, sub-s. 1 (*b*), or as a fraudulent preference within s. 44. Then again s. 37 (relation back of trustee's title) is of no assistance here, and apparently the exercise of a general power immediately before the appointor's bankruptcy can only be attacked under s. 42.

Now it is plain that fraudulent conveyances are inoperative against the bankruptcy laws. It is also plain that the capacity to exercise a general power exercisable by a bankrupt for his own benefit at the commencement of his bankruptcy passes to his trustee, and it would indeed be strange if the donee of a general power could on the eve of his bankruptcy

exercise it so as to deprive his creditors of the rights they would get through the trustee's exercising it.

I do not suggest that there is any evidence of the husband's insolvency at the date of the appointment, and there is no evidence of intent to defraud his creditors, or of any act of bankruptcy before May 7, 1925, and it is quite true that the statutory provisions enabling one man's property to be applied in paying another's debts must be strictly construed.

But the point still remains that this bankrupt had a general power which he could have exercised in his own favour up to a period of about three or four months before the commencement of his bankruptcy; and the only question is whether the exercise of this power in favour of his wife, a volunteer, was a voluntary settlement within s. 42.

I think it was such a voluntary settlement. Otherwise s. 38 (*b*) would be pro tanto ineffective, which cannot be the intention of the Act.

The wife relied on *Ex parte Gilchrist.* (1) That was a decision on the combined effect of the Married Women's Property Act, 1882, s. 1, sub-s. 5, and the Bankruptcy Act, 1883, ss. 44, 152. It is true that all the members of the Court of Appeal drew the well known distinction between property and power. I do not, however, read their judgments, because the trustee does not suggest that the general power is property. He merely says that the exercise of that general power amounts to a settlement of property within s. 42.

The wife also relied on *In re Guedalla* (2), where Warrington J. had to consider the case of a general testamentary power. The donee, having exercised it, became bankrupt and died without obtaining his discharge. Warrington J. held that the property had become assets for payment of the donee's debts, and went to his executor for that purpose and not to the trustee in bankruptcy. That decision, however, does not affect the present case, where the donee had a general power of appointment by deed or will and exercised it by deed.

(1) 17 Q. B. D. 521, 526, 528, 531, 536.
(2) [1905] 2 Ch. 331.

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The motion therefore succeeds and there will be a declaration that the deed poll, including the appointment and settlement made thereby, is void against the trustee under s. 42.

The consequence may be that the capacity to exercise the general power is now vested in the trustee under s. 38 (*b*), but that point has not been really argued, and I do not decide it.

G. R. A.

C. A.

The wife appealed. The appeal was heard on November 19, 1926.

Clayton K.C. and *Hansell* for the wife. The exercise of a power of appointment is not a settlement within s. 42 of the Act of 1914. The settlement of December 12, 1924, was an unimpeachable settlement and no question as to it arises. But for the bankruptcy the appointment under it would have been a valid appointment and the appointed property would have been the property of the wife. The object of the present application of the trustee is to take her property to pay another person's debts. Where a settlement, as in this case, has been made by a bankrupt the property ceases to be his property and an appointment subsequently made thereunder is not a settlement of his property within s. 42. In *In re Watson & Co.* (1) Vaughan Williams L.J. said: "It is essential before a Court can hold that one man's goods are to be taken to pay another man's debts, because of the reputation of ownership of the bankrupt, that the goods should be held and dealt with by the bankrupt in such manner and under such circumstances that the reputation of ownership must arise." The Court must therefore be satisfied that the property in question is the property of the bankrupt before it can hold that it falls within s. 42. Here the property was not the property of the bankrupt: he merely had a power of appointment over it.

[SARGANT L.J. By the settlement subject to the life interests of the husband and wife there was a reversion. Why was not that reversion "property"?]

(1) [1904] 2 K. B. 753, 756.

The settlement must be of "property," and the bankrupt had not the property at the date of the exercise of the power. "Property" is defined by s. 167 of the Act, and does not include a power. Ownership is the antithesis of power: Farwell on Powers, 3rd ed., p. 1; *Ex parte Gilchrist.* (1) Although the exercise of a general power of appointment may result in making that over which it is exercised property, yet an unexercised power does not have that effect. If s. 42 be carefully looked at it is, it is submitted, obvious that what the Legislature was there dealing with was the property of the bankrupt only.

Archer K.C. and *W. F. Waite* for the trustee in bankruptcy. The point is a short one, namely, whether a voluntary gift or settlement of property made in exercise of a general power of appointment is a settlement of such property within the meaning of s. 42.

Sect. 42 should be read as including property of which the bankrupt is competent to dispose for his own benefit. Under s. 38 the trustee in bankruptcy can vest property subject to a general power in himself. The scheme of the Act is that property subject to a general power should be assets in the bankruptcy. The function of s. 42 is to prevent property which would naturally become assets in the bankruptcy from not becoming so.

[LORD HANWORTH M.R. referred to *In re Lowndes.* (2)]

If any gloss is to be put on the word "property" in s. 42 it should, it is submitted, be "property available for creditors."

"Interest" in s. 42 may be satisfied by reading it as meaning "property which passes in exercise of a power." The capacity to exercise a power is itself a power: *Ex parte Gilchrist.* (3)

Clayton K.C. in reply. The question is really one of the construction of s. 42, and it is unnecessary therefore to discuss the policy of the Act. The exercise of a power of appointment is not property at all. There must be a dealing with the bankrupt's own property. From the opening words of

(1) 17 Q. B. D. 521. (2) (1887) 18 Q. B. D. 677.
(3) 17 Q. B. D. 521, 531.

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s. 42 it is clear that "property" is used in its strict legal sense. That view is supported by sub-s. 4 of the section, both by what it says and what it does not say. Sect. 38 is very much in my favour. If I am wrong in contending that a settlement of property does not include a settlement in exercise of a power then the latter is included in s. 38 (*a*), and it was not necessary to introduce it in s. 38 (*b*). I rely strongly on *Ex parte Gilchrist* (1), in which the ground of the decision was that the power in that case was not the separate property of the married woman, because it was not property at all.

Cur. adv. vult.

Dec. 3. The following written judgments were delivered.

LORD HANWORTH M.R. This is an appeal from a judgment of Astbury J. given on October 18, 1926. The appeal raises an important question upon the construction of s. 42 of the Bankruptcy Act, 1914—the section which provides for the avoidance of certain settlements as against the trustee in bankruptcy.

The facts are as follows :—

On August 8, 1918, the bankrupt entered into an ante-nuptial agreement with his future wife, and on April 9, 1919, he married the present appellant.

On July 13, 1923, an order was made in the Chancery Division at the instance of the appellant for specific performance of the ante-nuptial agreement, and on December 12, 1924, the bankrupt executed the settlement which had been prepared and approved to comply with the order for specific performance. Under that settlement the trustees appointed by it were to stand possessed of certain funds upon trust during the joint lives of the husband and the wife, that is the bankrupt and the appellant, to pay the annual income of certain specified investments to the appellant for her separate use without power of anticipation, and upon trust to hold the capital and income of certain funds therein described as the second moiety of the "husband's fund upon

(1) 17 Q. B. D. 521.

trust for such person or persons, for such purposes, and in such manner as the husband shall from time to time by any deed or deeds revocable or irrevocable or by will or codicil appoint."

On January 15, 1925, the bankrupt, under this power so reserved to him, executed a deed of appointment of this "husband's fund," from and after his own decease, in favour of the appellant absolutely.

On May 7, 1925, the bankrupt committed an act of bankruptcy, and on August 5, 1925, a receiving order was made against him; on August 26, he was adjudicated bankrupt, and on August 28, a trustee of his estate was appointed.

Sect. 42 of the Bankruptcy Act makes void against the trustee—that is to say voidable at the instance of the trustee (see *In re Vansittart* (1)), voluntary settlements made within two years of the commencement of the bankruptcy. The trustee claims that the appointment made as above stated on January 15, 1925, was void as against him and Astbury J. has decided in his favour. The wife appeals to this Court. It is contended on her behalf that this exercise of a power is not within the terms of s. 42: that her husband has not voluntarily disposed of any property within the section, but merely in pursuance of a power reserved to him, appointed the destination of a fund held not by him, but by the trustees of the settlement of December 12, 1924. No question is raised as to the interest of the bankrupt in the income of the funds over which the appointment is exercised. It is the appointment to his wife after that interest is determined that is called in question.

The relevant part of s. 42 is as follows: sub-s. 1: "Any settlement of property, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the

(1) [1893] 2 Q. B. 377.

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settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property passed to the trustee of such settlement on the execution thereof."

By sub-s. 4 of the same section, "settlement" is defined to include "any conveyance or transfer of property." It is not contested that the appointment is a conveyance or transfer within those words. But it is claimed that it is not a conveyance or transfer of property within the section.

Sect. 38 defines the property of the bankrupt divisible among the creditors, and it expressly provides (cl. (*b*)) that it shall comprise: "The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge, except the right of nomination to a vacant ecclesiastical benefice."

A forcible argument is urged in the appellant's favour upon this section. It is pointed out that an express enactment was necessary to bring the capacity to exercise a power within the meaning of the bankrupt's property which, without it, would not be comprised within "the property of the bankrupt divisible among his creditors."

It did not fall within cl. (*a*): "All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge": and so cl. (*b*) was necessary to embrace it.

The history of the sections in the previous Bankruptcy Acts of 1869 and 1883, similar in effect to s. 42 of the present Act, is given by Cave J. in his judgment in *In re Player*. (1)

(1) (1885) 15 Q. B. D. 682, 687.

The conclusion that he reaches is that "The transaction must be in the nature of a settlement, though it may be effected by a conveyance or transfer. The end and purpose of the thing must be a settlement, that is, a disposition of the property to be held for the enjoyment of some other person": and in applying the definition of property he says that one must look at the whole of the language of the section, and consider what is meant by "settlement": and that although that term includes any conveyance or transfer of property, it is a settlement in the ordinary sense of the word that is intended. That decision was approved by the Court of Appeal in *In re Plummer* (1); see also *In re Tankard* (2), per Wright J.

At this point it is to be observed that the latter part of sub-s. 1 of s. 42 is difficult to apply to the exercise of a power, which is in question in this case. The settlement that is made voidable may be contested by the trustee in bankruptcy within ten years after its date. But the parties claiming under it are given the opportunity of proving in defence of it "that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property passed to the trustee of such settlement on the execution thereof."

Now the property over which the power of appointment was exercised in this case was not available to the settlor at the time of the execution, for the purpose of paying his debts, and the interest of the bankrupt did not pass to the trustee of the settlement on the execution of the power. The meaning of these last words was held by Lord Macnaghten in *Shrager* v. *March* (3), to be that the settlor must on the execution of the settlement divest himself of all interest in the property settled.

If the whole language of the section is to be considered from the point of view adopted by Cave J. in *In re Player* (4), it would appear plain that the power of appointment in the

(1) [1900] 2 Q. B. 790.
(2) [1899] 2 Q. B. 57, 59.
(3) [1908] A. C. 402, 406.
(4) 15 Q. B. D. 682.

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present case does not accord with the attributes of a settlement at which s. 42 strikes.

Lastly, I come to *Ex parte Gilchrist.* (1) In that case real property was by a marriage settlement vested in a trustee in trust for the married woman for life for her separate use without restriction on anticipation, with remainder to such persons for such estates as she might, whether covert or sole, by deed or will appoint; and in default of appointment to her children in fee. The settlement also contained a provision under which the property could be sold or mortgaged by her direction and the proceeds paid to her. When the case was before the Divisional Court Cave J., considering the nature of the interest in the property created in favour of the married woman by the settlement, said (2): "A more complete case of all that substantially constitutes ownership it is impossible to conceive." Yet the Court of Appeal—reversing the decision of the Divisional Court—held that the property, in respect of which a married woman carrying on a trade separately from her husband was subject to the bankruptcy laws, under s. 1, sub-s. 5, of the Married Women's Property Act, 1882, did not include such a general power of appointment as she held under the settlement above recited. Lord Esher M.R. said (3) that "the distinction between a power of appointment over property and property has always been recognized, and that it has always been held that an unexercised power is not the 'property' of the donee of the power." The power exercises an effect upon property, but per se it is not property. Fry L.J. said (4): "A 'power' is an individual personal capacity of the donee of the power to do something. That it may result in property becoming vested in him is immaterial; the general nature of the power does not make it property. The power of a person to appoint an estate to himself is, in my judgment, no more his 'property' than the power to write a book or to sing a song. The exercise of any one of those three powers may result in property, but in no sense which the law recognises

(1) 17 Q. B. D. 167, 521.
(2) Ibid. 174.
(3) 17 Q. B. D. 526.
(4) Ibid. 531.

are they 'property.' In one sense no doubt they may be called the 'property' of the person in whom they are vested, because every special capacity of a person may be said to be his property; but they are not 'property' within the meaning of that word as used in law."

With these cases before me, it is not, in my judgment, the true interpretation of s. 42 to include such a power as is questioned in the present case within its terms.

I agree with Cave J. that the section is intended to deal with settlements, in a more ordinary meaning of that term—some disposition whereby the bankrupt has divested himself of property available at the date of the disposition for the payment of his debts; some disposition whereby at its date his interest is passed over to the trustee of it, and his estate, available in case of stringency and ultimate bankruptcy, rendered smaller. This view does not prevent the utility and effect of s. 38, sub-s. 2. There is a great difference between avoiding a settlement already made, and rendering available to the bankrupt's estate sources to which he might have had recourse "for his own benefit," and from which the estate may be supplemented.

I am therefore of opinion that Astbury J. has placed too wide an interpretation upon the section, and that the appeal must be allowed, with costs. The usual order as to the trustee's costs will be made.

ATKIN L.J. The question here is whether the exercise of the power of appointment by the husband in favour of his wife was in the circumstances of this case a settlement of property within the meaning of s. 42 of the Bankruptcy Act, 1914. The section reproduces s. 47 of the Bankruptcy Act, 1883. Two points are taken by the appellant: 1. That the Act only applies to a settlement of property of the debtor, i.e. property in which the debtor has some existing beneficial interest. 2. That the exercise of a power of appointment is not a settlement which, by sub-s. 4 of s. 42, is defined to include "any conveyance or transfer of property." I think that the appellant succeeds on the first point. I approach

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the construction of the section from the point of view that while bound to give full effect to the plain meaning of words in their natural sense I am entitled to expect clear words to be used, if it is intended to divert to the benefit of the debtor's creditors property which bona fide before the bankruptcy had passed beneficially to other persons. Voluntary gifts by a bankrupt made before bankruptcy have been the subject of statutory provisions since the Bankruptcy Act of 1 Jac. 1, c. 15. Sect. 5 of that Act provided that if a person who thereafter became a bankrupt conveyed to any of his children or other persons except for valuable consideration any " hereditaments . . . . goods, chattels " or transferred his debts into other men's names, the Commissioners should have power to grant sell and convey them as if the bankrupt had been actually seised thereof, or the debts were in his own name, of the like estate or interest to his or their own use at such time as he or she became bankrupt. The Bankruptcy Act of 6 Geo. 4, c. 16, s. 73, re-enacted this provision, and similar provisions are found in the Bankruptcy Act, 1849 (12 & 13 Vict. c. 106), s. 126, in an extended form. It appears plain that in these sections what was contemplated was a dealing with hereditaments and chattels which had belonged to the debtor: and a resumption by the Commissioners of his power of disposition over them. The statutes do not in terms avoid any conveyance or transfer, but grant a statutory power of sale.

The Bankruptcy Act of 1869, s. 91, initiated the present form, which avoids as against the trustee any voluntary settlement of property absolutely if made within two years of the bankruptcy, conditionally on failure to prove solvency if made within ten years of the bankruptcy. The section is substantially to the effect of s. 47 of the Act of 1883, except that it does not contain the condition at the end of sub-s. 1 of s. 47 that " the interest of the settlor in such property passed to the trustees of such settlement on the execution thereof." There is nothing in the Acts of 1869 or 1883 to suggest that there was any intention to depart from the provisions of the former Bankruptcy Acts, whereby only

voluntary dispositions of the debtor's own property were defeated. On the other hand the addition of the words I have mentioned in s. 47 of the Act of 1883, re-enacted in s. 42 of the present Act, appear to me to place beyond question the intention of the Legislature. The Act is only dealing with transfers by the debtor of property in which he has an interest. If it were otherwise the section would avoid such a transaction as this made after two years but within ten years before the commencement of the bankruptcy notwithstanding the solvency of the debtor at the time, for the appointee would be unable to show that any interest of the debtor in such property passed to her, for he had none.

It is perhaps advisable to develop the proposition that the debtor had no interest in this property. Property is defined in s. 167 in one of those illogical statutory definitions which include in the definition the term to be defined. We are therefore driven to some other source of definition. Happily the matter is authoritatively settled by the decision of the Court of Appeal in *Ex parte Gilchrist* (1), where Lord Esher, Bowen and Fry L.JJ. made it quite clear that in the ordinary use of language "property" does not include a general power of appointment. An argument, however, is based upon s. 38 of the Act of 1914, re-enacting s. 44 of the Act of 1883. It is there provided that the property of the bankrupt divisible amongst his creditors shall not include certain particulars but shall include (*b*) The capacity to exercise all such powers over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy; (*c*) All goods of which he is the reputed owner. The section is awkwardly framed, for it meant no doubt to vest in the trustee the powers over property, so that the property acquired by the exercise of the power might become the bankrupt's and so be divisible amongst the creditors. But in any view neither the debtor nor the trustee nor the creditors acquired or could acquire any interest in the property the subject of the power until the power is exercised. The

(1) 17 Q. B. D. 521;

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argument of the trustee, however, is that the policy of s. 42 is to defeat any voluntary dispositions of property which would prevent property otherwise divisible amongst the creditors from passing to the trustee: this exercise of the power is such a voluntary disposition, and, therefore, should be held to be covered by the section. I can only say that I can only find the policy of the Act from the words used, and the words used for the reasons given do not appear to me to reach the disposition in question. If I had to discuss the question of policy at all I find that goods in the reputed ownership of the debtor at the date of the bankruptcy are property divisible amongst the creditors, but there is no provision for defeating a voluntary disposition of them by the debtor so as to make them cease to be his reputed property. I should also have grave doubts whether the Legislature ever intended to avoid the exercise of powers by the debtor by words which, if given the wide construction contended for by the trustee, would have to cover the voluntary exercise by the debtor of powers of appointment which he could not exercise in favour of himself. I think therefore that on the first point taken by the appellant the appeal succeeds: and I need not consider the second point, whether the exercise of a general power can be a conveyance or transfer of property. The appeal should be allowed with costs and the order below discharged with costs. The trustee to have his costs out of the estate.

SARGANT L.J. I am of the same opinion. The neat question here is whether the "property," the settlement of which is avoided by s. 42 of the Bankruptcy Act, 1914, includes property over which the bankrupt had a general power of appointment. If it does, it is scarcely disputed that the exercise in the deed poll of January 15, 1925, of the general power given to the bankrupt by the prior deed of December 12, 1924, was a settlement within the section.

It is, I think, clear from the language of s. 42, sub-s. 1, that the "property" there referred to must be property which, apart from the settlement, would be available for the

payment of the bankrupt's debts. But this consideration alone does not exclude property over which the bankrupt had a general power of appointment only. For, by other sections of the Act, such property is made available for payment of his debts by the transfer to the trustee in bankruptcy of the right to exercise the power and by the duty cast on the trustee to exercise it in fact. On the other hand, however, the concluding words of s. 42, sub-s. 1, as to "the interest of the settlor in such property" having passed, do seem to me to imply that the property in question is property in which the bankrupt had an estate or interest in the ordinary sense, and does not include property, such as the reversionary interest here, over which he merely had a power however extensive.

I can see no logical reason why property over which a bankrupt has had a general power which he has exercised by way of settlement should not have been put on the same footing as property which he owned in the ordinary way. But cases in which voluntary settlements have been effected under such powers are, I should think, extremely rare; and it may be that this is a casus omissus. As matters stand, however, a trustee who seeks to displace and avoid existing interests must bring his case within the words of the statute taken in their ordinary sense, and cannot rely merely on the supposed general intention of the Legislature. And in my judgment the trustee here has failed to discharge this burden.

Appeal allowed.

Solicitors: *Raleigh S. Smallman; Cohen & Cohen.*

W. I. C.

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Nov. 17.

JOE LEE, LIMITED *v.* LORD DALMENY.

SAME *v.* SAME.

[1925. J. 541.]

Gaming and Wagering—Bets—Agreement to refer Dispute to particular Arbitrator—Validity—Tattersalls' Committee—Gaming Act, 1845 (8 & 9 *Vict. c.* 109), *s.* 18.

The plaintiffs were bookmakers and had engaged in betting transactions with two of the defendants. They relied upon an alleged legal and binding contract between themselves and their two customers whereby the latter respectively bound themselves in the event of any difference arising between them and the plaintiffs, to submit the difference to a particular tribunal. The contract relied on was contained in a subsidiary paragraph in a book of rules as to betting issued by the plaintiffs to their customers and intended to govern all transactions between them and their customers, and this had been agreed to by the two defendants. The plaintiffs having denied their liability in respect of certain bets, the defendants applied to Tattersalls' Committee, which was the recognized tribunal in such matters, to decide the dispute. The plaintiffs objected, and brought two actions against Tattersalls' Committee and their two customers claiming an injunction to restrain the Committee from investigating and adjudicating upon the dispute without the consent of the plaintiffs being first obtained and a similar injunction against the two customers to restrain them from proceeding with the arbitration:—

Held, (1.) that the paragraph in the book of rules was an integral part of the terms upon which the plaintiffs were willing to do business with their customers, and was part of one contract by way of gaming or wagering, and therefore void and unenforceable.

Held (2.), that even if there were a binding collateral contract of the character contended for no injunction could be granted against Tattersalls' Committee on the suggested ground that they had induced the customers to break their contract with the plaintiffs or had illegally attempted to coerce the plaintiffs into a line of conduct which they would not otherwise take; and both actions failed.

THE plaintiffs were bookmakers and turf commission agents, and the defendants in the first action were Lord Dalmeny and ten other gentlemen, members of Tattersalls' Committee, and Mrs. M. Frances, a betting client of the plaintiffs.

In the second action the defendants were Lord Dalmeny and the ten other members of Tattersalls' Committee, and F. W. D. Pratt, another client of the plaintiffs.

Tattersalls' Committee were an association formed for the purpose (inter alia) of adjudicating upon disputed debts arising out of betting transactions and were governed by rules and regulations on betting published in Ruff's Guide to the turf and to the public. In the Rules on Betting (as revised by Tattersalls' Committee on March 1, 1926) it was by r. 1 stated: "Tattersalls' Committee have authority to settle all questions relating to bets, to adjudicate on all cases of default, and, at their discretion, to report defaulters and persons guilty of any malpractice to the Jockey Club. If a defaulter is a partnership or limited company all or any of the partners or their agents and all or any of the shareholders, directors, officers, or agents of the defaulting company may be reported to the Jockey Club." The decisions of Tattersalls' Committee were enforced by the stewards of the Jockey Club, and if any person did not appear when summoned before the Committee, unless satisfactory reason was given for absence, the Committee proceeded with the case in his absence. Where a person refused to comply with a decision against him in respect of a dispute as to a bet it was their practice to report the fact to the stewards of the Jockey Club and to post such person as a defaulter at Tattersalls' and elsewhere, by reason whereof such a person might be warned off the heath at Newmarket and excluded from all enclosures, betting rings, and sporting clubs. The betting transactions which took place between the plaintiffs and the two defendants, Mrs. Frances and F. W. D. Pratt, were governed by certain printed rules drawn up and issued by the plaintiffs which were accepted by the defendants as binding. In this book of rules there was a subsidiary paragraph on page 2, that in case of any dispute arising the matter should be referred (within thirty days) to the editor of any paper in which the plaintiffs advertised, or to another responsible arbitrator by mutual agreement.

The defendant Mrs. Frances claimed to have won from the plaintiffs 272*l.* 3*s.* 4*d.* in respect of bets, and the defendant F. W. D. Pratt claimed to have won 55*l.* 10*s.* The plaintiffs disputed their liability for these sums. On May 1, 1925,

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F. W. D. Pratt referred his dispute, in accordance with the rules of the plaintiffs and with their consent, to Mr. Tomlin, of the Daily Express newspaper, but he was unable to make an award in the applicant's favour. Mrs. Frances made no appointment of any particular arbitrator, but desired Tattersalls' Committee to determine the dispute as to her claim. Afterwards Pratt applied to Tattersalls' Committee to adjudicate upon his claim, and on June 25, 1925, the Committee wrote to the plaintiffs saying that a complaint had been made to them by Pratt in respect of his claim for 55*l.* 10*s.*, and requesting the attendance of the plaintiffs at a meeting of the Committee fixed for July 6 at Tattersalls' rooms, when the complaint would be investigated, and in the event of their non-attendance at such meeting the Committee might proceed to adjudicate in the plaintiffs' absence.

The plaintiffs issued their writ on July 2, 1925. By an order of July 10, 1925, made on motion by the plaintiffs, the defendant Pratt was restrained until judgment in the action from proceeding with the arbitration or investigation before the Committee, and the Committee undertook, until judgment, not to investigate or adjudicate upon the dispute without the consent of the plaintiffs being first obtained. In their statement of claim the plaintiffs alleged that if the dispute was investigated and adjudicated upon by the Committee, as the defendants desired, an award or decision against the plaintiffs enforced by declaring them defaulters to the stewards of the Jockey Club, would cause great injury to their business and serious financial loss, or else the plaintiffs would be forced, in order to avoid such injury and loss, to comply with an award or decision in no way binding upon them. The plaintiffs therefore claimed: (*a*) an injunction to restrain Tattersalls' Committee from investigating and affecting to adjudicate upon the dispute between the plaintiffs and the defendants M. Frances and F. W. D. Pratt, without the consent of the plaintiffs being first obtained, and (*b*) a similar injunction against the defendants Mrs. Frances and Pratt from proceeding before Tattersalls' Committee with the arbitration.

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Gover K.C. and *Herbert Jacobs* for the plaintiffs. The Jockey Club was recognized as the supreme authority in all matters connected with racing and was governed by certain rules and had power to warn persons off the turf at Newmarket, and impose other penalties. With regard to disputes as to bets Tattersalls' Committee were the recognized tribunal to decide all such questions; but the plaintiffs did not recognize their authority in the present case, where there was an express agreement to the contrary. There was here a particular bargain of a legal and binding character made in accordance with the paragraph in the book of rules of the plaintiffs, that in the case of bets with their clients "should unfortunately any dispute arise we stipulate that the matter be referred within thirty days to the editor of any paper in which we advertise, or another responsible arbitrator by mutual agreement." The defendant Pratt did in the first instance refer the case of his disputed bet to an arbitrator, Mr. Tomlin, and on being dissatisfied with him he appealed to Tattersalls to adjudicate upon his disputed bet. The plaintiffs submitted: (1.) That the agreement to refer the dispute to a particular arbitrator was a perfectly valid and legal agreement. (2.) That although the Court would not specifically enforce such an agreement yet it would in a proper case restrain a breach of it by either party. (3.) That as regards Tattersalls' Committee the Court would restrain them from affecting to adjudicate on the matter on two grounds: (*a*) because it amounted to a wrongful inciting or inducing another to break his contract, and (*b*) because they threatened in what amounted to a conspiracy with the bettors, first to break their contract, and secondly to intimidate the plaintiffs into a course of conduct in reference to their lawful business which they are not bound to adopt.

On the first point there was nothing illegal in making the bet, though it cannot be enforced. The special contract here pleaded was collateral to the betting transaction, and is not in any way tainted by the betting contract: *Goodson* v. *Grierson* (1); *Hyams* v. *Stuart King* (2); *Whiteman* v.

(1) [1908] 1 K. B. 761. (2) [1908] 2 K. B. 696.

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Newey (1); *Hyde* v. *Tyler*. (2) On the third point as to Tattersalls' Committee the plaintiffs are entitled to an injunction in that the Committee are inciting the plaintiffs to commit a breach of the particular agreement. In *Quinn* v. *Leathem* (3) it was held that a combination of two or more without justification to injure a man in his trade by inducing his customers to break their contracts with him if it results in damage to him is actionable. In the present case there is an interference without just cause by the Committee, although it may not be malicious, but which is calculated to cause serious damage and loss to the plaintiffs: *Brimelow* v. *Casson*. (4) It amounted to a combination and conspiracy on the part of the Committee with the bettors and each other to commit an actionable wrong, for which there is no sufficient justification. Similar points have arisen in trade union cases, such as *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (5); *Larkin* v. *Long* (6); and *Pratt* v. *British Medical Association*. (7) The plaintiffs may suffer irreparable damage to their reputation and trade if the decision on the bets goes against them.

Geoffrey Lawrence K.C. and *Wilfrid Hunt* for the defendants. It is necessary that there should be one authoritative tribunal to decide all disputes in relation to bets; it is in the interest of racing that this should be so and that independent arbitrators should not be appointed. The Court will not grant an injunction, such as is asked here, unless some legal or equitable right has been violated: *Day* v. *Brownrigg* (8); *North London Ry. Co.* v. *Great Northern Ry. Co.* (9) There has been no interference with the plaintiffs in carrying on their business or in compelling them to take a course which they did not wish to adopt. The decision against a person found guilty of default may result in his exclusion from the property of the Jockey Club. It is not an award: *Hyde* v. *Tyler*. (2) There could be no inducing or procuring of a

(1) (1912) 28 Times L. R. 240.
(2) (1926) 42 Times L. R. 442, 652.
(3) [1901] A. C. 495.
(4) [1924] 1 Ch. 302.
(5) [1905] A. C. 239.
(6) [1915] A. C. 814.
(7) [1919] 1 K. B. 244.
(8) (1878) 10 Ch. D. 294.
(9) (1883) 11 Q. B. D. 30.

breach of contract by the defendants, as the whole contract from its inception was void, being one contract of gaming or wagering within the Act of 1845.

[They also referred to *Hyams* v. *Coombes* (1), which was a case of betting transactions with a bookmaker; *Luckett* v. *Wood* (2); *Société des Hôtels Réunis* (*Société Anonyme*) v. *Hawker* (3); *Caerleon Tinplate Co.* v. *Hughes* (4); *In re Smith & Service and Nelson & Sons* (5); and Russell on Arbitration, 10th ed., p. 323.]

The whole contract being void, the subsidiary contract is also void, and both actions should be dismissed.

Gover K.C. in reply.

EVE J. The plaintiffs in each of these two actions are claiming, in the events which have happened, an injunction to restrain the Committee of Tattersalls from entertaining and adjudicating upon complaints made to the Committee by persons with whom they have had betting transactions.

The case was opened, and Mr. Gover's argument was developed on the footing that there is a legal and binding contract subsisting between the plaintiffs and their two customers whereby the latter have respectively bound themselves in the event of any difference arising between them and the plaintiffs to submit that difference to a particular tribunal, that is to say, either the editor of some paper in which the plaintiffs are accustomed to advertise, or some other responsible arbitrator to be selected by mutual agreement. At an early stage of that interesting argument I ventured to point out that the superstructure was being raised upon the basis that the alleged agreement to refer is a valid and legal one, and the first question for determination is, whether or no it can rightly be so characterized. It is contained in a book issued by the plaintiffs to their customers, the contents of which are intended to constitute the contract upon which business is to be transacted between them. That is made quite clear, not only in the document

(1) (1912) 28 Times L. R. 413.
(2) (1908) 24 Times L. R. 617.
(3) (1913) 29 Times L. R. 578.
(4) (1891) 60 L. J. (Q. B.) 640.
(5) (1890) 25 Q. B. D. 545.

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itself, but in the first letter disclosed in the correspondence with Mrs. Frances. It is dated March 23, 1923, and the plaintiffs write: "We have pleasure to enclose copy of our rules for 1923, with which we trust you will make yourself thoroughly conversant, as they govern all transactions between us. Enclosed with the rules is a form of acknowledgment of the rules, and we shall be obliged if you will kindly sign and return the same as soon as possible." The form of acknowledgment is: "Dear Sirs, I have to acknowledge receipt of your rules, and having made myself thoroughly conversant with same agree that they are fair and meet with my approval." The particular part of this document which the plaintiffs allege the defendant customers have disregarded by their resort to Tattersalls' Committee is the notice or condition appearing on page two in these words: "Should unfortunately any dispute arise we stipulate that the matter be referred within thirty days to the editor of any paper in which we advertise or another responsible arbitrator by mutual agreement." That the rules in this book, if accepted, expressly or by conduct, would constitute a contract or agreement by way of gaming or wagering would not be disputed, but it has been argued that the paragraph I have read is not included under the heading "Rules," and ought to be treated as a separate agreement, and as one not tainted with the illegality attaching to rules regulating betting transactions. I cannot take that view. The paragraph is, in my opinion, an integral part of the terms upon which alone the plaintiffs were willing to do business with the persons to whom this book was sent. For some reason or another they desired and intended that their customers should be bound to resort to a particular tribunal, and should not be at liberty to carry their complaints to the Committee of Tattersalls', or any tribunal other than that to which they had contracted to submit themselves. I cannot separate that part of the document from the rules and treat the agreement to refer as one distinct and apart from the other contents of this book. There is only one contract and that a contract or agreement by way of gaming or wagering,

a contract therefore which is void and cannot be made the foundation of any successful application in these Courts. The relief claimed against the principal defendants here rests on the assertion that they have conspired to procure or incite the other defendants to commit a breach of this alleged contract, but when once the contract has been shown to be non-existent, the obtaining of any such relief obviously becomes impossible, and this in my view is the short answer to these actions. I may further add that even if there were a contract of the character contended for, that is to say a contract to refer not tainted by any element of illegality, it would not be one the breach of which would entitle the plaintiffs to an injunction against the Committee. They would be left to recover from the defendant customers such damages as they might ultimately be held entitled to. With regard to the suggestion that there has been some sort of conspiracy or combination amongst the members of the Committee to inflict damage on the plaintiffs unless they are prepared to submit to the Committee's arbitration I cannot myself see any ground upon which I ought to come to such a conclusion. This Committee is the recognized tribunal to which such matters are referred, and if the customers in the exercise of their rights have chosen to appeal to this tribunal it is for the plaintiffs to elect whether they will submit to the arbitration, or will allow it to proceed in their absence. It is quite impossible for me on the facts disclosed to hold that there is any illegal attempt by the Committee, or by the customers, to coerce the plaintiffs into a line of conduct which they would not otherwise take.

In my opinion the actions fail and they must be dismissed with costs.

Solicitors: *Geare & Son, for Ross & Son, Horley; Gibson & Weldon, for Rustons & Lloyd, Newmarket.*

G. M.

EVE J.
1926
Nov. 30.

In re LAMPLUGH IRON ORE COMPANY, LIMITED.

[00416 of 1926.]

Company—Voluntary Liquidation—Principal and Surety—Priority—Rights of Guarantor—Payment of Rates—Mercantile Law Amendment Act, 1856 (19 & 20 *Vict. c.* 97), *s.* 5—*Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 186, 209.

The director of a company in voluntary liquidation guaranteed and paid to the overseers of the poor the rates due from the company before the date of the liquidation:—

Held, that under s. 5 of the Mercantile Law Amendment Act, 1856, he was entitled to stand in the place of the creditors, and to use all remedies, and, if need be, the name of the creditor in any action or other proceeding in order to obtain indemnification from the principal debtor for the loss sustained.

Held, further, that in so far as the payment by the surety was made in respect of rates that became due and payable within twelve months before the date of the commencement of the liquidation, it would rank in priority of payment to the other debts of the company, by virtue of s. 209 of the Companies (Consolidation) Act, 1908.

MOTION.

The Lamplugh Iron Ore Co., Ld., were incorporated on May 14, 1910, with a capital of 5000*l.*, which was subsequently increased. In 1920 they created a series of debentures to the amount of 15,000*l.*, and later on another series for a further 15,000*l.* Myles Fleming Burnyeat was the holder of one of such debentures for 200*l.*, and was a director of the company. In September, 1925, the company was summoned to appear before the justices to show cause why certain rates due from the company amounting in the whole to 1690*l.* 18*s.* 6*d.* should not be paid. This sum was made up of poor rates and special expenses rate demanded on April 30, 1925, which amounted to 1276*l.* 2*s.* 3*d.*, and in addition there were arrears of poor rate, which had been demanded on November 25, 1924, and amounted to 414*l.* 16*s.* 3*d.* The company was unable to find the money, and fearing that a distress would be levied requested Myles Fleming Burnyeat to find the money or guarantee the payment. By a letter to the overseers dated September 23, 1925, M. F. Burnyeat guaranteed to pay these rates not later than October 8, 1925,

and the summons was withdrawn. On November 18, 1925, he paid the said rates. By an extraordinary resolution passed by the company on December 21, 1925, it was resolved that the company should be wound up voluntarily, and Robert Lyon Wyllie, of Whitehaven in the county of Cumberland, was appointed liquidator. On December 22, 1925, the same gentleman was appointed receiver for the debenture holders. The assets of the company had been sold, and after providing for all preferential payments there was not sufficient for the payment of the outstanding debentures in full. The sum in the liquidator's hands for that purpose was 21,582*l.* 4*s.* 4*d.* M. F. Burnyeat claimed to be a preferential creditor in respect of the sum of 1276*l.* 2*s.* 3*d.*, part of the rates paid by him under his guarantee.

An originating summons was issued on October 18, 1926, on behalf of the liquidator for the determination of the question whether the respondent, M. F. Burnyeat, was entitled to be repaid in priority to the debenture holders the sum of 1276*l.* 2*s.* 3*d.* paid by him on behalf of the company under his guarantee in respect of rates due from the company. A debenture holder was also made a respondent to this summons. The matter came before a registrar on November 18, 1926, and after reference to *In re Russell* (1) he held that M. F. Burnyeat was not entitled to be paid the sum in question in priority to the debenture holders. The applicant thereupon gave notice of motion dated November 25, 1926, before Eve J., that the registrar's order of November 18 might be discharged, and that in lieu thereof it might be declared that M. F. Burnyeat was entitled to be paid the 1276*l.* 2*s.* 3*d.* in priority to the debenture holders. The motion now came on for hearing.

Potts for the applicant. Under s. 5 of the Mercantile Law Amendment Act (2) the applicant having paid the rates

(1) (1885) 29 Ch. D. 254.

(2) By s. 5 of the Mercantile Law Amendment Act, 1856, it is provided as follow:—

"Every person who, being surety for the debt, or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or

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under his guarantee to the company is entitled to stand in their shoes and to take all such actions as would enable him to recover his loss. Having regard to s. 209 of the Companies (Consolidation) Act, 1908 (1), the overseers are entitled to priority in respect of rates due twelve months before the date of a voluntary winding up, and the applicant as surety and guarantor is put into the same position as the original creditors and can claim priority to the debenture holders. There have been decisions which bear out the principle of that claim, though it does not appear to have arisen in the case of rates due to the overseers of the poor. *Swire* v. *Redman* (2); *In re M'Myn* (3); and *In re Lord Churchill* (4) established the principle. In his decision the registrar here seems to have relied upon *In re Russell* (5), and dealt with the first part of s. 5 of the Mercantile Law Amendment Act, 1856, which is not relied on here. He also referred to *Food*

to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be and upon a proper indemnity, to use the name of the creditor in any action or other proceeding at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shal have so paid such debt or performed such duty, and such payment or performance so made by such surety shall not be pleadable, in bar of any such action or other proceeding by him. . . . ."

(1) By s. 209 of the Companies (Consolidation) Act, 1908, it was provided:—

"(1.) In a winding up there shall be paid in priority to all other debts:—

(*a*) All parochial or other rates due from the company at the date hereinafter mentioned, and having become due and payable within twelve months next before that date. . . . .

(5.) The date hereinbefore in this section referred to is:—

(*a*) In the case of a company ordered to be wound up compulsorily which had not previously commenced to be wound up voluntarily, the date of the winding-up order; and

(*b*) In any other case, the date of the commencement of the winding up."

(2) (1876) 1 Q. B. D. 536.

(3) (1886) 33 Ch. D. 575.

(4) (1888) 39 Ch. D. 174.

(5) 29 Ch. D. 254.

Controller v. *Cork* (1), in which latter case it was decided that as to Crown debts there could be no claim to priority of payment in a voluntary liquidation other than the priority given by statute, and here there is the statutory priority.

The applicant cannot be debarred from his statutory remedy by the technical defect of not having proved in the liquidation. He is entitled to prove for the 1276*l.* 2*s.* 3*d.* in the name of the overseers in priority to the debenture holders.

E. W. Sutton for the debenture holders. First, as a preliminary point the priority given by s. 209 of the Companies (Consolidation) Act is in respect of rates due to the overseers at the date of the winding up in the voluntary liquidation, and there was no such debt due at that time. It had been paid. That is fatal to this motion. Secondly, under s. 186 of the Companies (Consolidation) Act, 1908, all debts in a voluntary liquidation, with certain exceptions, are to be payable pari passu, and the exceptions do not include debts due to sureties. Thirdly, as to the Mercantile Law Amendment Act, 1856, the registrar was right in saying that where it was inconsistent with the Companies (Consolidation) Act, 1908, that Act being later in date and containing a complete code for the administration of the assets of companies in liquidation must prevail, and the provisions of the former Act be disregarded. *In re Lord Churchill* (2) was not opposed to that view, as in that case a surety who had paid a Crown debt was held entitled to the Crown's right of priority in an administration action, and that was independent of the Act. The registrar was therefore right in refusing the applicant's claim to priority.

Lavington for the company.

EVE J. In my opinion Mr. Burnyeat is entitled to the priority he claims. By s. 5 of the Mercantile Law Amendment Act (19 & 20 Vict. c. 97) it is provided that a surety who has paid a debt shall be entitled "to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor,

(1) [1923] A. C. 647. (2) 39 Ch. D. 174.

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in any action or other proceeding, at law or in equity, in order to obtain from the principal debtor "—I leave out the words which do not apply—" indemnification for the advances made and loss sustained by the person who shall have so paid such debt . . . . and such payment . . . . so made by such surety shall not be pleadable in bar of any such action or other proceeding by him. . . . ." It is true that when the payment was made on November 18, 1925, there did not subsist the remedy which the surety is now asserting, for at that time the company was still a going concern, and no question as to priority in respect of debts could arise, but within a month of the payment there accrued, by reason of the winding up, a new remedy which I think was available to Mr. Burnyeat should he elect to enforce it. By s. 209 of the Companies Act, 1908, the rates so paid, in so far as they had become due and payable within twelve months prior to December 21, 1925 (the date of the commencement of the winding up), were entitled to priority of payment over the other debts of the company, and I am unable to see on what ground it could be held that this remedy, which would have accrued to the original creditor if he had not already been paid, is not available to the surety. So to hold would be to treat payment of the debt as a bar to the remedy. But that appears to me to be contrary to the statute, which provides in substance that when the surety seeks to enforce his remedy he shall be in the same position as if he were the original creditor still unpaid. There is nothing, I think, to preclude Mr. Burnyeat from asserting the right to priority given to particular creditors by the statute, and in my opinion he is entitled to such priority to the amount of 1276*l.* 2*s.* 3*d.*

Solicitors for all parties: *Beachcroft, Hay & Ledward, for Brown, Auld & Brown, Whitehaven.*

G. M.

EVE J.
1926
Oct. 28.

In re ASCHROTT.

CLIFTON *v.* STRAUSS.

[1926. A. 260.]

Revenue—Estate Duty—Estate of Alien Enemy—Alien Enemy Beneficiaries—Securities in English, South African, and American Companies having English Offices—Transfer by English Custodian of South African Securities to South African Custodian and of American Securities to American Custodian—Liability of English Administrator to pay Estat Duty—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 2; *s.* 6, *sub-s.* 2; *s.* 7, *sub-s.* 5; *s.* 8, *sub-s.* 3; *s.* 22, *sub-s.* 2 (*a*).

The testator, a German subject, was, at the outbreak of war, entitled to stocks, shares, and securities in English, South African, and American companies, which had been purchased for him by German banks, acting through their London agencies. The certificates were in all cases situate in London, and the securities themselves were transferable in London at the outbreak of war, and at the date of the testator's death. The testator died on May 5, 1915, in Berlin, being domiciled in Germany. By his will three-fifths of his property were bequeathed to German and Austrian beneficiaries, and two-fifths to British and Polish beneficiaries. In 1915 the testator's will was proved in Germany by the executors named therein. In November, 1922, grant of administration in England was made to the plaintiff. By virtue of the provisions of Treaty of Peace Orders, the whole of the interests of the German and Austrian beneficiaries became charged with and subject to the claims of the Custodian of Enemy Property.

In pursuance of an agreement, made in 1921, between a representative of the Government of South Africa and representatives of the Government of the United Kingdom, all the South African securities were, in the year 1922, transferred by the direction of the English Custodian to the South African Custodian. An executor dative was appointed in South Africa to administer the testator's South African estate, and estate duty in South Africa was paid by him in respect thereof.

Some of the American securities were claimed by the American Alien Property Custodian, and were transferred to him by the English Custodian. Administration of the testator's American estate was granted in America, and the securities were transferred to the American Custodian to be distributed by the American administrator among the beneficiaries. All the remaining American securities, with the exception of a small balance, were released to the plaintiff by the English Custodian. In May, 1924, the plaintiff, at the direction of the Estate Duty Office, filed a corrective affidavit, including therein those of the American securities which had been released to him at that date, and he paid estate duty and interest in respect thereof.

The Commissioners of Inland Revenue claimed that estate duty was payable out of the assets of the testator in the hands of the plaintiff on all the English, South African, and American securities, taking their value as the market value of similar securities at the date of the testator's death. This summons was taken out by the plaintiff to

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have it determined whether estate duty was payable on all or any of the various securities, and, if so, at what rate, and on what basis of valuation, and subject to what allowance (if any) such estate duty should be paid:—

Held, that all the shares were locally situate in England, and that the administrator was bound to include them as property of which the testator was competent to dispose, and was accountable to the extent of the assets he had received for the estate duty in respect thereof, under s. 6, sub-s. 2, of the Finance Act, 1894.

Held, further, that the basis of valuation of such shares was the price similar shares would fetch in the open market at the date of the testator's death, within the meaning of s. 7, sub-s. 5, of the Act of 1894.

ADJOURNED SUMMONS.

At the outbreak of war in 1914 the testator, who was a German subject, was entitled to stocks, shares, and securities in English, South African, and American companies which had been purchased for him by the Deutsche Bank of Berlin and other German banks acting through their London agencies. The certificates were in all cases situate in London, and the securities themselves were transferable in London at the outbreak of the war, and at the date of the testator's death. A correct list of these securities was set out in three schedules to the summons.

The testator died on May 5, 1915, in Berlin, being domiciled in Germany. By his will dated July 28, 1913, three-fifths of his property were bequeathed to German and Austrian beneficiaries, and the remaining two-fifths to British and Polish beneficiaries. The defendant Strauss was one of the British beneficiaries. In 1915 the testator's will was proved in Germany by the executors named therein. On November 24, 1922, grant of administration in England was made to the plaintiff, subject to an undertaking given by him to account to the Public Trustee for such share of the testator's property in England as belonged to ex-enemy beneficiaries. Valuations of the securities registered in England and of those registered in South Africa and America were made by London stockbrokers. At the date of the testator's death these securities, together with others, were held in large blocks by the London agencies, and had not been specifically allocated to the testator, but allocations

were made from time to time after his death in the course of the liquidation of those agencies.

By virtue of the provisions of Treaty of Peace Orders, made in pursuance of the Treaty of Versailles, the whole of the interests of the German and Austrian beneficiaries became charged with and subject to the claims of the Custodian of Enemy Property. The securities in companies registered in England or the proceeds of sale thereof, together with accumulated dividends thereon, were from time to time released to the plaintiff by the Custodian, and only a few of those securities remained to be released. Estate duty at the rate of 5 per cent. was paid on them prior to the grant of administration.

The South African companies had offices in London, at which, under normal conditions, transfers of the securities could at all material times be registered. By virtue of the South African Act 39 of 1916 any dealing with the South African securities was prohibited, and under Proclamation 148 of 1920 these securities became vested, or were purported to be vested, in the South African Custodian of Enemy Property. Under an agreement dated November 17, 1921, and made between a representative of the Government of South Africa and representatives of the Government of the United Kingdom, it was agreed that all shares in South African companies which were specifically vested in the English Custodian prior to June 22, 1916, should be regarded as belonging to him, and should be allocated to him for disposal, and dealt with as he might deem fit, and that all other shares in South African companies not so vested in him prior to June 22, 1916, should belong to and be allocated to the South African Custodian to be disposed of and dealt with by him as he might deem fit. In pursuance of that agreement all the South African securities were in the year 1922 transferred, by the direction of the English Custodian, to the South African Custodian, and, in accordance with South African law relating to property of ex-enemy nationals, had been sold by the South African Custodian, who, after deducting certain expenses, issued certificates of credit in

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the South African Union 4 per cent. Loan in respect of such proceeds, together with interest allowed in lieu of dividends accrued since 1914. An executor dative was appointed in South Africa to administer the testator's South African estate, and the certificates of credit, or the proceeds of their realization, were being distributed by him direct to the beneficiaries. Estate duty in South Africa was paid by him in respect of the nominal amount of the certificates of credit issued to him.

The American securities were capable, under normal conditions, of being transferred or otherwise dealt with in England at all material times. Of these securities some were claimed by the American Alien Property Custodian, and were transferred to him by the English Custodian. Administration of the testator's American estate was granted in America, and the securities were transferred to the American Custodian to be distributed by the American administrator among the beneficiaries. Of the remainder of the American securities, all, with the exception of a small balance, were released to the plaintiff by the English Custodian.

On May 17, 1924, the plaintiff, at the direction of the Estate Duty Office, filed a corrective affidavit, including therein those of the American securities which had been released to him at that date, and he paid estate duty and interest in respect thereof. The Commissioners of Inland Revenue claimed that estate duty was payable out of the assets of the testator in the plaintiff's hands on all the English, South African, and American securities, taking their value as the market value of similar securities at the date of the testator's death. The plaintiff thereupon took out this summons asking whether estate duty was payable on all or any of (*a*) the English securities, (*b*) the South African securities, and (*c*) the American securities, and, if so, at what rate and on what basis of valuation and subject to what allowances (if any) such estate duty should be paid.

Cleveland-Stevens for the plaintiff.

C. J. Radcliffe for the defendant Strauss. Estate duty

is not payable on the South African and American securities, because they were not situate in England at the date of the testator's death. The local situation of property for the purposes of estate duty is an arbitrary conception. It is true that the existence in England of branch registers to record transfers of these shares would, in normal times, have made these shares, if found within the jurisdiction at the death, subject to estate duty: *Stern* v. *The Queen.* (1) The test is, could the testator's personal representatives acquire the full title to the property without having to do any act outside the jurisdiction of the Court that granted probate? In *Attorney-General* v. *Bouwens* (2) it was held that probate duty was payable in respect of foreign bonds, it not being necessary for the executor to do any act out of the kingdom in order to render the transfer of them valid. Then there is the rule that shares are situate in the country where the company of which they are shares is incorporated or has its head office: *Attorney-General* v. *Higgins.* (3) In *Bradbury* v. *English Sewing Cotton Co.* (4) it was held that the locality was to be determined by the place of residence and trading of the company. In this case the first test cannot be applied, since, at the date of the testator's death, it was impossible to say what acts would have to be done by his executors to obtain a title to the shares, and where. Moreover, since the testator had appointed alien enemies to be his executors, representation of him by them or their nominees in England became impossible during the period of the war. One test being inapplicable in the circumstances of this case, only the other remains. These shares being shares of companies incorporated out of the United Kingdom, and not shown to have their principal place of business here, they were, at the death, property situate abroad, and therefore exempt from estate duty under s. 2, sub-s. 2, of the Finance Act, 1894, since the deceased was domiciled abroad: *Thomson* v. *Advocate General.* (5)

(1) [1896] 1 Q. B. 211.
(2) (1838) 4 M. & W. 171.
(3) (1857) 2 H. & N. 339.
(4) [1923] A. C. 744.
(5) (1845) 12 Cl. & F. 1.

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Assuming that the securities were not situate abroad at the date of the testator's death, then the Court, in applying taxing statutes, must investigate the machinery provided for collecting the tax, and if it cannot find machinery for collecting the tax in a particular case, it may infer that it was never intended that a tax in such a case should be imposed: see Lord Herschell in *Colquhoun* v. *Brooks*. (1) Estate duty is a tax collected upon certain accounts; ss. 6, 8 of the Finance Act, 1894. Sect. 8, sub-ss. 3, 4, sums up the accounts which are intended to comprise all property liable to duty. Then the question arises, would these securities have been included in the Inland Revenue affidavit as defined by s. 22, sub-s. 1 (*n*)? This, as the second schedule to the Act shows, was the affidavit and account on which probate duty was paid; it had to include particulars of the personal estate for and in respect of which the probate was to be granted. This meant the personal estate of the deceased to which the Probate Court could confirm the executor's title: *Attorney-General* v. *Dimond*. (2) But in this case, owing to the embargo imposed, no executor could ask to be given title to the shares, and therefore could not include it in the Inland Revenue affidavit. Sect. 8, sub-s. 3, requires supplementary accounts from the executor, but they are only supplementary to the account annexed to the Inland Revenue affidavit, and cannot be intended to include personal property situate in the United Kingdom of which the testator was at his death "competent to dispose," which must go into the Inland Revenue affidavit, if it goes anywhere. There is therefore no account provided for which in the peculiar circumstances would include these shares, and it is safe to infer that no duty should be charged.

The next question that arises is, how these shares are to be valued if they are chargeable with estate duty? The property that passed on the death was the testator's interest (whatever that might be) in the shares, not the shares themselves, which were at his death held to the order of the Treasury. Under s. 7, sub-s. 5, of the Act of 1894 this interest must be valued at the price which a purchaser in the open

(1) (1889) 14 App. Cas. 493; 506–7. (2) (1831) 1 Cr. & J. 356.

market would have given for it, knowing all the circumstances: *Attorney-General* v. *Jameson.* (1) Alternatively, if the Court treats the shares themselves as passing, and values the property at the value in the open market of similar shares at the date of the death, it must make allowance for the want of title: s. 9, sub-s. 3. The shares were vested in the Custodian of Enemy Property in 1918, and he held them as directed by Trading with the Enemy Amendment Act, 1914 (5 Geo. 5, c. 12), s. 5, and that section recognizes no legal or beneficial title in the previous enemy alien owner: *In re Munster.* (2) The vesting affected a defeasance of title.

[*In the Goods of Ewing* (3) cited.]

Stafford Crossman for the Commissioners of Inland Revenue. The position of the shares at the date of the testator's death is the only material fact. In this case all the investments were, at the testator's death, situate in the United Kingdom, and the exemption conferred by s. 2, sub-s. 2, of the Finance Act, 1894, which applies only to property out of the United Kingdom, is inapplicable, and that is the only exemption to s. 1 of the Act, under which all property passing on the death is chargeable with estate duty.

The South African companies having duplicate registers in London, and the share certificates being held in London on behalf of the testator, the securities were locally situate in the United Kingdom: *In re Clark.* (4) The American share certificates, on which a form of transfer and power of attorney had been indorsed and executed in blank, being marketable in London and being held there on behalf of the testator, were also locally situate in the United Kingdom: *Stern* v. *The Queen.* (5) Even where the testator was a foreigner domiciled abroad, such shares are liable to estate duty: *Winans* v. *Attorney-General.* (6) Estate duty became payable upon the value of all the shares at the death, irrespective of what happened afterwards, and at the death of this testator the shares were held by the English Custodian

(1) [1905] 2 I. R. 218.
(2) [1920] 1 Ch. 268.
(3) (1881) 6 P. D. 19.
(4) [1904] 1 Ch. 294.
(5) [1896] 1 Q. B. 211.
(6) [1910] A. C. 27.

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simply as Custodian, and no specific vesting order had been made, and no charge had been imposed. Under s. 22, sub-s. 2 (*a*), of the Act of 1894, the testator was " competent to dispose " of the investments at his death within the meaning of s. 6, sub-s. 2, and s. 8, sub-s. 3, notwithstanding s. 5 of Trading with the Enemy Amendment Act, 1914. Under s. 6, sub-s. 2, of the Act of 1894, the administrator has to pay the estate duty, and under s. 8, sub-s. 3, he is accountable for such duty. Under s. 7, sub-s. 5, the value of the shares is the price they would fetch in the open market at the date of the death, irrespective of subsequent events.

EVE J. The question whether estate duty is payable on all or any of the shares referred to under the headings A, B, and C in the first question of the summons depends upon the answer to the inquiry whether they can be brought within any of the exceptions in the Finance Act, 1894. It has been argued in the first place that they are excepted under s. 2, sub-s. 2, as being property passing on the death of the deceased situate out of the United Kingdom in respect of which under the law in force before the passing of the Act legacy or succession duty would not have been payable. Were these shares in companies registered in South Africa and America, but having offices in England where certificates could be produced, transfers passed, and the names of transferees entered on the register, property situate out of the United Kingdom ? Prima facie their locality, and in particular in those cases where the certificates were within the jurisdiction, was in this country. The evidence of title is the register, and according to the case of *Attorney-General* v. *Higgins* (1), that determines the locality of the shares. But it is urged on behalf of the beneficiaries that in this case the property ought to be held to have been out of the United Kingdom, because at the date of the testator's death the registration office in this country had ceased to be available to the testator and those claiming under him, in that they were restrained by the emergency legislation from disposing

(1) 2 H. & N. 339.

of or dealing with these shares by way of transfer or otherwise. In the condition of things subsisting at the testator's death and for a long time after that event, it is argued that the shares had lost their locality in this country, and that during this suspensory period their locality ought to be determined by the rule frequently adopted for income tax purposes—namely, that shares in a company are regarded as locally situate at the place where the company carries on its administrative business and is domiciled. Applying this rule it is contended that these shares ought to be regarded as locally situate where these mining and other companies were respectively resident and carrying on business, that is to say, in South Africa and the United States. I cannot agree. In my opinion the fact that the testator's power of disposing of the shares and effecting any transfer of them had been temporarily suspended could not operate to change the location of the particular shares held by alien enemies, leaving unchanged the locality of shares held by those shareholders whose power of disposition was not affected by the legislation I have referred to. The shares remained throughout locally situate in this country.

But then it is said the Finance Act contains no provision under which the executor in the circumstances subsisting at the testator's death could properly include these shares in the accounts annexed to the affidavit leading to probate under s. 8, sub-s. 3, because they did not constitute property of which the deceased was competent to dispose at his death. But this argument not only overlooks s. 22, sub-s. 2 (*a*), of the Act, but ignores the fact that the testator's disability did not prevent his dispositions becoming effective, although it is true that under the Treaty they have been diverted in the case of the alien enemy beneficiaries.

I think both points advanced by Mr. Radcliffe fail; the shares were locally situate in England and the administrator was bound to include them as property of which the deceased was competent to dispose, and is accountable to the extent of the assets he has received for the estate duty in respect thereof under s. 6, sub-s. 2.

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The second question in the summons relates to the value to be placed on the shares. By s. 7, sub-s. 5, of the Act, it is provided that "The principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased." At the testator's death, part of the property passing under his will consisted of shares saleable in the open market. It is true that, by reason of the subsisting war, he was disqualified, and his executors after his death were disqualified, from transferring the shares, but these shares were only part of the share capital of the several companies in which he was interested, and, in order to ascertain the market price of the shares which were disposed of by his will the broker was bound, I think, to find out at what price similar shares were being sold and dealt with on the market, and to return that as being the correct valuation; it was not open to the valuer to say: "The market price of shares in this particular company is so much, but, in view of the fact that the transferor of these shares is an alien enemy, the market for some of the shares (those which he would be purporting to transfer) would be nil." That, it seems to me, would not have been applying the test which he was, under the statute, bound to apply. He was to certify the value of shares of these particular companies, and not what was the value of shares held by somebody at the moment incompetent to transfer. I think therefore the valuation proceeded upon the strict lines laid down by the statute.

The Inland Revenue authorities by way of concession are willing to allow a sum to be deducted from this valuation equivalent to the estate duty already paid in South Africa, and the value put upon the South African shares will be reduced accordingly.

Solicitors: *Harvey Clifton; Stanley Attenborough & Co.; Solicitor of Inland Revenue.*

P. J. B.

VICTORS, LIMITED (IN LIQUIDATION) *v.* LINGARD.

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Oct. 15, 18, 19;
Nov. 8.

[1925. V. 353.]

Company—Articles—Resolution—Issue of Debentures to Creditor—Interested Director—Validity of Resolution.

The articles of a company provided that no director should be disqualified from entering into contracts, arrangements, or dealings with the company, but that no director should vote as a director in regard to any contract, arrangement, or dealing in which he was interested.

The directors of the company personally guaranteed an overdraft granted to the company by a bank. As a result of negotiations with the bank they subsequently passed a resolution that, subject to the approval of the bank, first debentures be issued for 30,000*l.* to be issued to the bank as security for the overdraft. Debentures were issued in accordance with this resolution. The company ultimately went into liquidation, and an action was commenced by the company against the bank for a declaration that the debentures were invalid and for other consequential relief:—

Held, that the directors were "interested" in the arrangement come to with the bank in regard to the issue of the debentures, and that the resolution providing for the issue of the debentures was a nullity: but that on the facts, having regard to the subsequent history of the proceedings between the company and the bank, the company was estopped from alleging the invalidity of the debentures and that the action consequently failed and must be dismissed.

WITNESS ACTION.

The following facts are taken from his Lordship's considered judgment:—

The plaintiffs, Victors, Ld., now in liquidation, are seeking to impeach certain debentures for 30,000*l.* issued while the company was still a going concern in the names of the defendants Lingard and Mare as nominees for the defendants the Midland Bank, Ld. The facts giving rise to the action are as follows. Victors, Ld., was incorporated on December 14, 1911, for the purposes of carrying on the business of chemical manufacturers. Its board of directors consisted, at all times material for the present purpose, of five gentlemen named Weiler, Levin, Allen, Hill and Holt. By the beginning of May, 1920, the company were desirous of obtaining an overdraft from their bankers of 25,000*l.* Their account was at this time kept at the Manchester

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branch of Lloyds Bank. This bank, however, was only willing to allow the overdraft if the company would give them a debenture to secure it, and this the directors were not willing to do. The directors accordingly approached the Manchester branch of the defendant bank, then known as the London City & Midland Bank, Ld., with a view of obtaining such an overdraft on the personal guarantee of the directors. On May 10, 1920, the Manchester branch of the Midland Bank forwarded to their head office in London a formal application for such an advance, accompanied by a letter discussing the proposal and containing the following statement: "Mr. Hill further says that later the company will, if required, also give a debenture for the full amount if we give them fourteen days' notice to enable the directors to find the money if they desire." The formal application, however, contained no reference to this term, merely stating that the security offered was the joint and several guarantee of the five directors. On May 12 the Manchester branch sent to the head office an amended application and thereupon there was written across the first application the word "Superseded." This amended application was substantially in the same form as the original one, but contained in that part which stated what security was to be given the following statement: "Company's undertaking not to issue debentures without the bank's consent." This amended application was sent by the Manchester branch to the head office on May 12, 1920, with a note or letter in which the Manchester branch states: "We have arranged for an undertaking to be given by the company not to issue debentures without the bank's consent." This amended application received the assent of the head office on May 28, 1920. In the meantime, on May 13, 1920, at a meeting of the board of directors of the plaintiff company, it had been resolved that in consideration of the grant by the Midland Bank of an overdraft to the company of an amount not exceeding 25,000*l.* no debentures should be issued by the company or any further mortgage or charge on the assets of the company should be created without the assent

of the bank. At the same meeting it was resolved that in consideration of the execution by the directors of the company of the guarantee of the overdraft not exceeding 25,000*l.* the company should on demand by the directors issue to them a debenture or debentures to indemnify them against all liabilities claims and demands whatsoever incurred by the directors in respect of the guarantee. A copy of the first of these resolutions was sent to the Manchester branch of the Midland Bank on May 13, 1920. On May 15, 1920, the five directors signed a formal guarantee to the bank to secure all sums of money which might at any time be owing to the bank from the company, but limiting the liability of each of the directors to the sum of 25,000*l.* As from the completion of these arrangements the bank permitted the company an overdraft which by the month of October, 1921, amounted to some 26,000*l.* It was contended on behalf of the bank that one of the terms on which this overdraft was arranged was that the company should if required give a debenture for the full amount on the bank giving fourteen days' notice. I am unable to adopt this view. Although this term was mentioned in the covering letter from the Manchester branch when the first formal proposal was sent to the head office, no further reference to it can be found, and it is not mentioned in the amended proposal or in the covering letter by which that proposal was sent to the head office. I think that the true view is that the only terms upon which the overdraft was permitted are those stated in the amended formal proposal, which contains no reference to such a term and which appears to have been the only proposal that was accepted by the head office. It ought to be mentioned that the bank never in fact called upon the company to issue debentures to them to secure the overdraft and, so far as they were concerned, they seemed content to rely upon the guarantee and the company's undertaking not to issue debentures without their consent. But in the month of August, 1921, the question of the issue by the company of debentures was raised by the directors themselves, and on the 19th of that month a notice was issued convening a directors' meeting

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for the 26th for the purpose (amongst other things) of discussing a proposal that the directors should be protected by the company in respect of the guarantee to the bank given by them "as per previous resolution and agreement between the directors and the company." This meeting was duly held, and at such meeting it was resolved as follows: "That the company issue debentures or mortgage to secure the bank and/or directors in relation to their guarantees and that details be submitted in writing to the directors after Messrs. Levin and Hill have interviewed the bank." Such an interview appears to have taken place, for on August 31, 1921, I find the Manchester branch of the bank writing to the head office as follows: "At present there is a mortgage of part of the company's property to secure 3500*l.* at 5 per cent. per annum, and we hold a letter from the company by which they undertake not to create any further mortgage or charge on the assets of the company without the consent of the bank. They now propose to create debentures for 50,000*l.*, 35,000*l.* to be left with us as additional security for the present advance; the remainder they propose to use for raising fresh money outside the bank. They ask for our assent to this proposal." It would appear from this letter that the idea of issuing debentures to the directors themselves had been abandoned, and further that they were desirous of raising moneys on debentures for the purposes of the company. This of course they could not do without the consent of the bank, and the proposal that part of the debentures should be left with the bank as additional security was made in part, no doubt, for the purpose of inducing the bank to give the necessary consent. But it is of course obvious that the issue of debentures to the bank would be of indirect benefit to the directors as guarantors of the overdraft. The proposal appears to have been subsequently amended by reducing the amount of the debentures to be deposited with the bank from 35,000*l.* to 30,000*l.*, but on September 10 the head office declined the proposal on the ground that it would not suit the bank to take debentures where others of the same series were held by outsiders to rank

pari passu with the bank's security. The directors thereupon reconsidered the matter and on September 21, 1921, passed a resolution in the following terms: "It was resolved subject to the bank's approval, that first debentures be issued for 30,000*l.* to be issued to the bank as security for the overdraft at present existing and second debentures for 35,000*l.* to be issued as and when required." On October 15 this proposal was accepted by the head office. On October 28 Mr. Hill, the director, who is a solicitor and was acting as such for the company, sent a draft debenture to the bank for its approval, and in due course such approval was given by the head office, who requested the Manchester branch to let them have copies of the relative resolution and of the memorandum and articles of association of the company. On November 22 accordingly Mr. Hill sent to the Manchester branch a certified copy of the resolution of the board of September 21, 1921, authorizing the issue of the debentures, together with a print of the memorandum and articles. In the meantime—namely, on November 21, 1921, at a meeting of the directors a resolution was passed that the company's seal should be affixed to the 30,000*l.* first debentures and that the latter should be signed by two directors and issued forthwith to the Manchester branch. On the same day the seal of the company was accordingly affixed to the debentures, which were in due course registered in the names of the defendants Lingard and Mare. The transaction was completed by the execution by the company of a memorandum of deposit charging the debentures in favour of the bank to secure the overdraft.

It is now necessary to refer to the company's articles of association, for it is in consequence of the provisions of one of those articles that the plaintiff company challenge the validity of the debentures so given to the bank. The article in question is that numbered 70 and is in these terms: "A director shall not be disqualified by his office from entering into contracts, arrangements, or dealings with the company nor shall any contract, arrangement, or dealing with the company be voided, nor shall a director be liable to account

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to the company for any profit arising out of any contract, arrangement, or dealing with the company by reason of such director being a party to or interested in or deriving profit from any such contract, arrangement or dealing and being at the same time a director of the company, provided that such director discloses to the board at or before the time when such contract, arrangement, or dealing is determined upon his interest therein, or, if his interest be subsequently acquired, provided that he on the first occasion possible discloses to the board the fact that he has acquired such interest. But no director shall vote as a director in regard to any contract, arrangement, or dealing in which he is interested or upon any matter arising thereout, and if he shall so vote his vote shall not be counted, nor shall he be reckoned for the purpose of constituting a quorum of directors."

Manning K.C. and *Hodge* for the plaintiff company. The transaction falls directly within art. 70. It has been decided in *In re Greymouth Point Elizabeth Ry. and Coal Co.* (1) that such a contract is a contract in which a director is interested: see also *In re North Eastern Insurance Co.* (2) It would be cutting down art. 70 to a very serious extent if it were held that a transaction like this could stand. Having regard to these decisions the directors were interested within the meaning of this article, and were not entitled to vote or to be reckoned for the purposes of constituting a quorum.

[They also referred to *In re G. Stanley & Co.* (3) and *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.* (4)]

Maugham K.C. and *J. M. Easton* for the defendant bank. If directors, who have given a guarantee to a bank, are prohibited from giving security it is strange that no case has been raised on this point up to now. The directors were not interested in this transaction and there has been no breach of art. 70. The resolution is not one by which the directors are doing more than they are bound to do.

(1) [1904] 1 Ch. 32.
(2) [1919] 1 Ch. 198.
(3) [1925] Ch. 148.
(4) [1895] 1 Ch. 629.

In *Poole, Jackson & Whyte's Case* (1) a question of fraudulent preference arose. It involved the proposition that there was no harm in the payment off of a bank overdraft by the directors. Art. 70 does not appear to extend the equitable rule so as to make the directors "interested." This is a transaction intended to enable the company to continue to carry on its business. The article only really relates to profits which are in the ordinary sense likely to arise out of the transaction or, if it goes further than that, it only relates to direct advantages to be got out of the transaction. The proposal which comes before the bank is not one for the relief of the directors but for the assistance of the company. The action is misconceived.

[They proceeded to contend that, having regard to the subsequent history of the proceedings, the company was estopped from raising the point that there was no authority for the resolution.]

Manning K.C. in reply.

Cur. adv. vult.

Nov. 8. ROMER J. [after stating the facts as above set out, continued:] It is said on behalf of the plaintiffs that all the directors of the company were interested in the arrangement come to with the bank for the issue of the debentures within the meaning of this article, that they were therefore incapable of voting in favour of the resolution of September 21, 1921, and that the debentures were invalidly issued and are void. It is on the other hand contended by the bank that though the issue of the debentures would or might ultimately be of some benefit to the directors, yet the directors were not "interested" in the matter within the meaning of the article. Looking, however, at the whole article, it seems to me that its object was to ensure to the company that its directors should not be placed in a position in which their personal interests might be in conflict with the duty they owed to the company, and that in all transactions entered into by them on behalf of the company, the

(1) (1878) 9 Ch. D. 322.

ROMER J. company should be able to rely upon their unbiased and independent judgment. Now it cannot be doubted that each of the directors, if he merely consulted his own interest, must have desired to see the bank protected by debentures as soon as possible. From the point of view of the company, however, it was at any rate a debatable point whether debentures should be issued to the bank, even though such issue was the only way for the company to obtain the consent of the bank to raising fresh capital by the issue of second debentures. As already stated, the directors were averse from issuing debentures in May, 1920, for the purpose of covering the overdraft, and I must assume that they considered such an issue to be at that time contrary to the best interests of the company. It appears, moreover, that at the general meeting of the company held in the month of February, 1922, the policy of the directors in issuing debentures was adversely criticized by some of the shareholders. It was surely a question upon which the company was entitled to have the unbiased and independent judgment of its directors, and this it did not and could not have. In my opinion the directors were "interested" in the arrangement come to with the bank in regard to the issue to them of the first debentures within the meaning of art. 70, and the resolution of September 21, 1921, was a nullity. That being so, it is difficult to see how the resolution could stand as regards the second debentures, some of which, I understand, were in fact issued. For the issue of these debentures was an essential part of the arrangement come to with the bank, who were induced to give their consent to such issue in consideration of the issue to themselves of the first debentures. In these circumstances I think that I should have insisted upon the holders of the second debentures being made parties to the action before making any declaration as to the invalidity of the first debentures or giving to the plaintiffs the relief they seek in this action. As, however, for reasons connected with the later history of the case I have come to the conclusion that the plaintiffs are not entitled to succeed in this action against the bank, it is unnecessary

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to consider the position of the second debenture holders further.

[His Lordship then dealt with the question of estoppel, and held that the company was, in view of the subsequent history of the proceedings between the company and the bank, estopped from alleging the invalidity of the debentures, and that the action consequently failed and must be dismissed.]

Solicitors: *Lawrance, Webster, Messer & Nicholls; Rawle, Johnstone & Co., for Addleshaw, Sons & Latham, Manchester.*

J. L. D.

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[1926. A. 677.]

Local Government—Bridge carrying Highway over River—Liability to repair —Urban Authority—"Street"—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 149, 152.

Seven streets, which were carried over a river by means of iron girder bridges and which were constructed in 1882 in the course of the development of an estate, ultimately became vested in and under the control of the local authority. The bridges fell into disrepair, and the Attorney-General commenced an action against the local authority for a declaration that they were liable to repair them and to keep them in repair.

By s. 4 of the Public Health Act, 1875, it is provided that the word "street," if not inconsistent with the context, includes any bridge, not being a county bridge:—

Held, that, as there appeared to be no context inconsistent with the inclusion of the bridges in the seven streets, there seemed to be no reason why effect should not be given to what appeared to be the natural meaning of the statute, and that the plaintiff was entitled to the declaration which he sought.

Great Eastern Ry. Co. v. *Hackney District Board of Works* (1883) 8 App. Cas. 687 considered and distinguished.

WITNESS ACTION.

The following statement of facts is taken from his Lordship's judgment:—

In the year 1882 the relators were the owners of the Harringay Park Estate, which they proposed to develop by making roads and erecting houses thereon. The estate was intersected

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by the New River. The relators, accordingly, entered into an arrangement with the New River Co. for the construction by that company of seven iron girder bridges over the river, and for the grant to the relators and those claiming under them of rights of way for all purposes over and across the river by means of the seven bridges so to be constructed. In due course the seven bridges were erected by the New River Co., and the relators carried one of their new roads over each bridge. In this way there were constituted within the defendants' district seven streets, not being highways repairable by the inhabitants at large within the meaning of s. 152 of the Public Health Act, 1875. But these streets, having been sewered, levelled, paved, flagged, channelled, and made good, and provided with proper means of lighting, to the satisfaction of the defendants as such urban authority, were from time to time duly declared by the defendants to be highways under the provisions of that section, and thereupon became highways repairable by the inhabitants at large.

From that time the provisions of s. 149 of the Act became applicable, and, by virtue of that section, the streets and the pavements, stones, and other materials thereof, and all buildings, implements, and other things provided for the purposes thereof, vested in and came under the control of the defendants, and the defendants became liable to cause such streets to be repaired from time to time as occasion might require.

By s. 4 of the Act the word "street," if not inconsistent with the context, includes any public bridge not being a county bridge. In these circumstances, and all seven bridges being in a state of disrepair, the plaintiff asserts that the defendants are liable to repair them. The defendants, however, repudiate any such liability.

Maugham K.C. and *C. P. Sanger* for the plaintiff. These bridges are highways repairable by the defendants. There is a common law liability to repair them, and they are under a liability to repair them as part of the streets. The whole

structure of the bridge vests in the highway authority, because if they do not maintain the bridge they cannot maintain the road over it. As to the material statutes and the definition of a bridge see Pratt & Mackenzie's Law of Highways, 17th ed., p. 103; see also Coke Rep., vol. vi., pt. 13, p. 33. A bridge, according to the definition, must be over a river, so a railway bridge is not a bridge for the purposes of these statutes: see *Rex* v. *Oxfordshire* (*Inhabitants*). (1) The Court is not, therefore, in the present case concerned with bridges over ravines or roadways or with arches over a swamp.

Under the Statute of Bridges (22 Hen. 8, c. 5) the duty of repairing a bridge fell prima facie on the county. That statute regulated nearly every bridge until the County Bridges Act (Lord Ellenborough's Act), 1803. Under the latter statute conditions had to be complied with before the county could be held liable to repair a bridge. Since the Highway Act, 1835, a county bridge has remained repairable by the county or public authority, but a non-county bridge, being a bridge forming part of the highway, is within the word "highway," and is repairable by those people who are bound to repair the highway, with certain exceptions—namely, prescription or ratione tenurae—where an individual may be liable. The plaintiff relies on ss. 149 and 152 of the Public Health Act, 1875. The latter statute in terms vests a "street" in the local authority (s. 149), and by definition (s. 4) shows that public bridges are vested in the local authority. The bridges in question vest in and come under the control of the Urban Council. It is inconceivable that the inhabitants of a town can be put in the position of being told that the urban authority are going to repair streets and not bridges. In *Regent's Canal and Docks Co.* v. *Gibbons* (2) Swift J., though merely deciding that the defendant was not liable to repair a certain bridge, considered the definition of "street" in the Public Health Act, 1875, and took the view (in order to arrive at his decision) that the bridge was taken over by the local authority at the time

(1) (1830) 1 B. & Ad. 289, 291. (2) [1925] 1 K. B. 81.

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when the road was taken over. In *Great Eastern Ry. Co.* v. *Hackney District Board of Works* (1) the observations in the speech of Lord Watson would have been different if he had been dealing with a bridge erected over a running stream. Under the Act of 1835 and the Public Health Act, 1875, it was intended to provide that the local authority should have vested in them and should repair and maintain bridges which were not county bridges. Swift J. was right in his view that the latter case did not affect the question before him; nor does it affect the present case. There appears to be no case showing that it is permissible for a public authority to let bridges fall into disrepair.

[They also referred to *Reg.* v. *Lordsmere* (*Inhabitants*). (2)]

Macmorran K.C. and *Ronald Walker* for the defendants. There is a series of cases on the meaning of the word "vest." The vesting extends only to the zone of user: see *Tunbridge Wells Corporation* v. *Baird* (3); see also the notes to s. 149 of the Public Health Act, 1875, in Lumley on Public Health, 9th ed., vol. i., p. 273. There is no authority for the contention that bridges which are not repairable by the county are repairable by the highway authority. The law with regard to a highway (which is equally the law with regard to a bridge) is stated thus by Wills J. in *Eyre* v. *New Forest Highway Board* (4): "Now since 1835 you may have a way which is an undoubted public way, because the owner has dedicated it to the public, and they have used it, and it has become in that way a public highway, which people have a right to go backwards and forwards along, and yet there may be no right to repair it, and no duty to repair it upon anybody." Sect. 152 had only the effect of vesting the street in the local authority. The *Great Eastern Ry. Co.'s* case (1) is absolutely in point, and governs the present case. It is a common thing to find a highway over a bridge distinguished from the bridge itself. The case is misconceived, and the liability to repair the bridges is not cast on the local authority.

(1) 8 App. Cas. 687.
(2) (1886) 54 L. T. 766.
(3) [1896] A. C. 434, 442.
(4) (1892) 56 J. P. 517.

Maugham K.C. in reply. The bridge over which a highway passes, being a bridge super flumen, is part of the structure of the highway: *Reg.* v. *Chart and Longbridge* (*Inhabitants*). (1) Under the Highways Act there is no doubt that a highway included a bridge (not being a county bridge): see Halsbury's Laws of England, vol. xvi., p. 189, para. 342, where reference is made to *Reg.* v. *Southampton County* (*Inhabitants*). (2) If the county is not bound to repair the bridge the highway authority is bound to do so. There is no reason for limiting the vesting section so as to exclude a bridge super flumen, but there is the strongest reason for reading the vesting section as vesting the bridge in the local authority. All bridges as to which the inhabitants cannot throw the burden of repairing them upon some third party must be repaired by the local authority, unless it is the intention of the Legislature to leave streets in such a state that they may at any moment become traps and a danger to the public. These seven bridges are bridges of a public character, and must be taken to be vested in the defendants, and the defendants must be held liable to repair them.

Cur. adv. vult.

Nov. 22. ROMER J. In this case His Majesty's Attorney-General, on the relation of the British Land Co., Ld., asks for a declaration that the defendants, as the urban authority of Hornsey, are liable to repair and keep in repair seven bridges within the defendants' district. [His Lordship then stated the facts as above set out and continued:] The bridges in question are admittedly public bridges not being county bridges. The defendants are admittedly liable to repair the seven streets; and the Act says that the streets include the bridges, there being no context that I can see inconsistent with their inclusion. At first sight, therefore, the plaintiff's claim would appear to be justified by the language of the statute. It would also at first sight appear to be justified by common sense.

For if the bridges, owing to want of repair, become incapable

(1) (1870) L. R. 1 C. C. 237. (2) (1852) 18 Q. B. 841.

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of supporting the road surface above them, that surface will collapse, and will cease to exist as a highway, and the defendants, having no right to compel any other body or person to repair the bridges, will, unless they repair the bridges themselves, be unable to perform the duty which they concede is imposed upon them of keeping that surface in repair.

The defendants, however, contend that the matter is by no means so simple as all this, and that, in face of various authorities on which they rely, I am constrained to come to a different conclusion. And, even apart from authority, they say that the Act cannot bear the construction that the plaintiff seeks to put upon it, inasmuch as the Legislature cannot have intended to place upon urban authorities so heavy a liability as that construction involves. But the authority was not, at any rate before 1925 it was not, under any compulsion to declare a street crossing a bridge to be a highway under s. 152, and if they did not wish to become liable to repair the bridge, they could refrain from exercising the powers of that section.

Having regard to s. 82 of the Public Health Act, 1925, the authority may now, no doubt, in certain circumstances be compelled to declare a street a highway repairable by the inhabitants at large. But that is only when the street is sewered, levelled, paved, flagged, metalled, channelled and made good to the satisfaction of the authorities. If, therefore, "street" includes the bridge, the authority need not make the declaration and incur the liability to repair until, amongst other things, the bridge is made good to their satisfaction. I can see no reason for coming to the conclusion that in 1875 the Legislature could not have intended urban authorities to incur the liability of repairing a bridge.

I must now turn to the authorities upon which the defendants rely. They say, in the first place, that in numerous cases the Courts have considered and explained the true effect and extent of the vesting provision of s. 149, and that the idea that the fabric of a bridge can become vested in an

urban authority under the section is altogether inconsistent with the decisions in those cases.

Mr. Macmorran, however, did not refer me to more than one of those authorities. He very properly contented himself with citing a passage from the speech of Lord Herschell in the case of *Tunbridge Wells Corporation* v. *Baird* (1) as summing up the law upon the subject. Lord Herschell there said: "It seems to me that the vesting of the street vests in the urban authority such property and such property only as is necessary for the control, protection and maintenance of the street as a highway for public use."

Lord Halsbury expressed himself in much the same way: "It is intelligible enough," he said, "that Parliament should have vested the street qua street, and, indeed, so much of the actual soil of the street as might be necessary for the purpose of preserving and maintaining and using it as a street."

Applying this criterion, it would seem that where a roadway runs across a bridge spanning a river and the urban authority, as here, have no means of compelling any other party to keep the bridge in repair, the bridge must vest in the authority to such an extent as is necessary to enable them to keep the bridge in repair, and so maintain the street as a highway for public use.

In this connection reference may usefully be made to *Reg.* v. *Lordsmere* (*Inhabitants*). (2) In that case the defendants had been indicted for the non-repair of a wall alleged to form part of a highway. The wall was in fact a retaining wall supporting the highway, which at that point ran along the side of a steep hill, and which would have slipped away without the retaining wall or some such support. It was contended for the defendants that even if they were liable to repair the highway, they were not liable to repair the wall. The jury at quarter sessions were directed to consider: (1.) Whether the wall formed part of the highway; (2.) whether the wall was out of repair; and (3.) whether such wall was repairable by the defendants. The jury found the

(1) [1896] A. C. 434, 437, 442.
(2) 54 L. T. 766.

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defendants guilty, and upon a case stated for the consideration of the Court of Crown Cases reserved, it was held that the question of whether the wall was part of the highway was not a question of law but purely a question of fact, which was very properly left to the jury, and that the jury could properly answer the question in the affirmative. As I understand this case, it is an authority for the proposition that where there is, as there is here, a liability to keep in repair a highway, the question of what constitutes the highway for that purpose is a question of fact. If that be so, then, apart altogether from the definition in s. 4, I should arrive at the conclusion that in the circumstances of the present case, the bridges form part of the highways that the defendants are admittedly liable to keep in repair. This conclusion seems to be in accordance with the statement in Halsbury, vol. xvi., para. 342, that a bridge in a highway, if it be not a county bridge, is repairable as part of the highway by the persons, if any, liable to repair the highway. But, however that may be, I have in the present case the express provision that the word "street" includes any public bridge not being a county bridge. Now if the contention of the defendants be correct, the reference to bridges in this section is not easy to understand unless the object be to make it clear that a street is a street, even where it passes over a bridge. But if that were the object, it is very difficult to see why an exception should have been made in the case of county bridges, which are bridges that the county is liable to repair.

Before the passing of Lord Ellenborough's Act the county were liable to repair every bridge (by which I mean a bridge carrying a highway super flumen seu cursum aquae) unless such liability attached to some other person or corporation ratione tenurae or otherwise. And this liability extended to the highway for a distance of 300 feet from each end of the bridge. It was provided, however, by Lord Ellenborough's Act that a bridge thereafter erected could only become a county bridge when erected under the direction and to the satisfaction of the county surveyor. If any bridge were made otherwise than under the direction and to the satisfaction

of the surveyor the liability to repair it would seem to have been in the persons liable to repair the highway that crossed it. For, even before Lord Ellenborough's Act, there were instances of structures that carried highways over a stream which were held not to be county bridges, and these structures appear to have been treated as part of the highway and repairable as such. In *Rex* v. *Whitney* (*Inhabitants*) (1) Lord Denman C.J. said that the mere fact of an arch passing over a stream did not necessarily make it a bridge. In that case the parishioners of Whitney were indicted for non-repair of a public horse and carriage way 374 yards in length. The defendants contended that deduction must at all events be made in respect of a bridge and 300 feet at each end of it which lay within the termini specified in the indictment. The so-called bridge was a stone arch 9 feet wide, and without parapets, carrying the highway across a mill stream. At the trial Park J. expressed the view that it was a culvert, and merely left to the jury the question whether or not the road was out of repair. The Crown obtained a verdict, and a motion for a new trial was refused by the Court of King's Bench. It was suggested that Park J. had laid it down that the structure was not a bridge in that it wanted parapets. As to this Littledale J. said: "The learned judge did not lay down any proposition of law as to the want of parapets . . . .; what he said was merely that . . . . there was fair ground for saying that the place in question was part of the highway."

In *Reg.* v. *Southampton County* (*Inhabitants*) (2) it was held that a bridge carrying a public footpath over a stream and consisting of three planks 9 feet long and a handrail was not such a bridge as the county was bound to repair. In the course of the argument, and when it was stated that the bridge had been repaired by certain Commissioners, Lord Campbell C.J. said: "The fact of its having been repaired by the Commissioners would rather raise a presumption that it is part of the highway." I have referred to these two authorities in some detail, because it seems to

(1) (1835) 3 Ad. & E. 69. (2) 18 Q. B. 841, 853.

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me that they are authorities for the statement in Halsbury, vol. xvi., para. 342, to which I have already referred. No one can doubt that in both cases the structure was a bridge, though not a county bridge, and in both cases it was regarded as being a part of the highway, and repairable as such.

Reverting once more to the question of county bridges, it is to be noted that by virtue of s. 21 of the Highway Act, 1835, as construed by the Courts, in the case of all county bridges built after the passing of the Act, the liability to repair the highways leading to, passing over, and next adjoining the bridge does not rest upon the county, but is thrown upon those who would have been liable to repair the highways assuming that they did not cross the bridge. If, then, the object of s. 4 of the Public Health Act, 1875, was to make it clear that a street for the purposes of the Act was none the less a street because it passes over a bridge, one seems driven to the conclusion that a street passing over a county bridge is not a street for the purposes of the Act. In the case, therefore, of county bridges erected after 1835 the position would be extraordinary. For the urban authority would be under no obligation and would have no power to keep in repair the highway crossing over it. If, however, the true view of the definition clause be that the structure of a bridge is to be deemed a part of the street, the exclusion of county bridges is intelligible enough. For the county is responsible for the repair of the structure of those bridges, and there was no reason, therefore, for vesting the structure in the urban authority, or imposing upon them the liability to repair such structure.

It remains, however, to consider the case of *Great Eastern Ry. Co.* v. *Hackney District Board of Works* (1), inasmuch as Mr. Macmorran contends that I am precluded by that authority from coming to the conclusion that the defendants are liable to repair the seven bridges. In that case the railway line ran in a deep cutting much below the level of the highway, which was carried over the railway by a bridge built by the railway company under statutory powers, and

(1) 8 App. Cas. 687, 691.

in pursuance of ss. 46 to 51 of the Railways Clauses Consolidation Act, 1845. The District Board of Works, having paved the highway, which was admitted to be a new street within s. 105 of the Metropolis Management Act, maintained that the railway company were liable to contribute to the expenses of that operation, as being owners of land bounding or abutting on both sides of the roadway of the bridge. One of the points taken by the railway company in opposition to such claim was that the fabric of the bridge was vested in the Board of Works by virtue of s. 96 of the Metropolis Management Act, 1855. That clause provides that all streets being highways shall vest in and be under the management and control of the vestry or district board, the word "street" being declared by the interpretation clause of the Act to apply to and include any bridge not being a county bridge. Lord Watson, in repelling this argument on the part of the railway company, said this: "It was assumed, no doubt rightly, by the counsel on both sides of the bar, that the rights and liabilities of the appellants, with reference to this bridge, were regulated by the Railways Clauses Act, 1845."

He then proceeded to examine the relevant sections of that Act, pointing out amongst other things that the Act appeared to distinguish the road itself from the bridge carrying it over the line, and continued as follows: "The real import of these enactments is, that the substitute road shall be supported by means of a bridge provided by the railway company, the land upon which the old highway rested having been taken and used for railway purposes. In my opinion the right of the public, or of the highway authority, is not thereby enlarged. Their right is, in the first place, in and to the road, and may extend to the materials of which it is composed; and in the second place, to have subjacent support to the road from a properly constructed bridge. They are also entitled, in terms of the statute, to have the road maintained, and to have the bridge kept properly fenced by the railway company; but these provisions do not appear to me to imply that they are to have

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any greater interest in the bridge and its fences, as distinguished from the road proper, than they had in the strata upon which the original road rested. These remained the property of the landowner, although burdened with a public right of way in perpetuity. The Metropolis Management Acts do not, in my opinion, confer upon district boards any larger rights in the streets and highways placed under their charge than had previously belonged to the public. The statutory functions of the district board are limited exclusively to the surface of the road or street proper. In the case of new streets, what s. 105 of the Act of 1855 authorizes the board to do is to 'pave the same, either throughout the whole breadth of the carriage-way and footpaths thereof, or any part of such breadth, and from time to time keep such pavement in good and sufficient repair.' Keeping in view, then, that the sole object of vesting streets, and the materials of which they are composed, in district boards is to enable them effectually to perform their statutory duties in relation to the streets, I cannot suppose that the Legislature, in enacting that the word 'street' shall 'apply to and include' any bridge, intended to vest in the board anything more than the street which is carried or supported by the bridge."

Now I cannot read these last words of Lord Watson as intended to be of general application to all bridges. Had that been his intention, I cannot think that he would have examined in such detail, as he did, the provisions of the Railways Clauses Act, 1845. As I understand his judgment, his view was this: that it could not have been the intention of the Legislature, in passing the Metropolis Management Act, to interfere by its general provisions with the special provisions as to bridges contained in the Railways Clauses Act, 1845, and that, by virtue of the Metropolis Management Act, district boards obtained no larger right in streets and highways placed under their charge than had previously belonged to the public.

I do not read his judgment as affirming the proposition that, even though a district board is unable effectually to

perform its statutory duties in relation to a street without having vested in it a bridge carrying that street, the structure of the bridge nevertheless does not vest in them; or the proposition that even though the public had previously been under a liability to repair the structure of a bridge such a liability did not pass to the district boards. Such propositions, indeed, seem to be inconsistent with the language that he used.

If I put upon the section of the Public Health Act to which I have referred the construction contended for by Mr. Macmorran, the defendants will not be able to discharge properly their duties in respect of the highways that cross over the bridges, and their liability for repair in respect of such highways would, as it seems to me, differ in a material respect from the liability of the public that existed before the passing of the Act in respect of highways carried over bridges that are not county bridges. In these circumstances there is, in my opinion, no reason why I should not give effect to what appears to me to be the natural meaning of the words of the statute. I must accordingly make the declaration that is asked for.

Solicitors: *Russell, Sons & Bass; Sharpe, Pritchard & Co., for E. B. Croasdell, Town Clerk, Hornsey.*

J. L. D.

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In re SYMONS.

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[1926. S. 832.]

Settled Land—Compound Settlements—Estates settled by different Compound Settlements upon same Limitations—Trustees of Settlement of Aggregate Estate—Power to discharge Incumbrance on whole of one Settled Estate and on part of another out of Capital Moneys part of latter Settled Estate —Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 1, *sub-s.* 1; *s.* 31, *sub-s.* 1; *s.* 64; *s.* 91, *sub-s.* 1 (*i.*), (*ii.*), *sub-ss.* 2 *and* 4.

S. by his will, made in 1873, settled his freehold lands in the county of S. (hereinafter called the S. estates) to the use of S. J. for life, with remainder to such uses for the benefit of the children or remoter issue of S. J. as S. J. should by deed or deeds or by will appoint, with remainders over in default of appointment.

The testator died in 1878, and about the year 1910 freehold lands at R. (hereinafter called the R. estate) were purchased out of proceeds of sale of parts of the S. estates. The R. estate together with the remaining unsold parts of the S. estates and the capital moneys settled by the will of S. were appointed by S. J. in exercise of his power, as follows:—(1.) by deed dated February 25, 1924, the R. estate was appointed to the use of his son B. for life, with remainders to B.'s sons and daughters in tail, with remainders over, which did not exhaust the fee simple; (2.) by a codicil to his will, dated May 8, 1924, the property then remaining unappointed which comprised the parts of the S. estates then remaining unsold and capital moneys were appointed upon limitations identical with those upon which the R. estate was settled by the deed of February 25, 1924. The whole of the R. estate and parts of the S. estates settled by the codicil and specific parts of the capital moneys had, before those appointments, been charged under a deed dated June 23, 1913, by S. J. in exercise of his power of appointment, with a sum of 10,000*l.* in favour of his daughter, and had by the same deed been demised to trustees for a term of years to secure that sum:—

Held, (1.) that each of the estates was settled by a compound settlement consisting, in the case of the R. estate, of the will of S. and the deed of appointment of February 25, 1924, and in the case of the S. estates of the will of S. and the codicil of S. J. notwithstanding that the first instrument in each case was the same; (2.) that the trustees of the will of S., who were trustees of the settlement thereunder for the purposes of the Settled Land Act, 1925, were by virtue of s. 31 of that Act, trustees for those purposes of each of the compound settlements; (3.) that by force of s. 91, sub-s. 1, sub-cl. (ii.), as "trustees of the settlement of the aggregate estate for all the purposes of the Act," they had power, at the direction of B., the tenant for life, to discharge the 10,000*l.* which was

charged upon the whole of the R. estate and on part of the S. estate out of capital moneys, whether already charged or not, in exoneration of those estates; (4.) that no order of the Court was required, because both settlements were without the provisions of sub-s. 2 of s. 91, the lands comprised in neither settlement being subject to a charge to which the lands in the other settlement were not subject; (5.) that the transaction being one which was "otherwise authorised by the Act," no order of the Court was required under s. 64 of the Act; and, lastly, that the trustees of the compound settlements were the proper persons to execute vesting deeds in favour of B., the tenant for life, of the settled lands respectively comprised in those settlements.

ADJOURNED SUMMONS.

The Reverend Benjamin Parsons Symons, D.D., late the Warden of Wadham College, Oxford, made his will, dated May 19, 1873, whereby he devised all his freehold hereditaments in the county of Somerset to the use of John Frederick Jeune during his life and after his decease to such uses and upon such trusts and in such manner in all respects for the benefit of all and every or such one or more exclusively of the others or other of the children or remoter issue of John F. Jeune as he by any deed or deeds or by his last will or any codicil thereto should from time to time appoint, and in default of such appointment and so far as any such appointment should not extend to the use of the first and every other son of John F. Jeune severally and in succession according to their respective seniorities in tail, and in default of such issue to the use of the first and every other daughter of John F. Jeune severally and in succession according to their respective seniorities in tail with divers remainders over in default of such issue. The testator empowered the trustees of his will with the consent of the person who under the limitations thereof should for the time being be entitled for life to the actual possession of the devised estates to sell or exchange the same.

The testator died on April 12, 1878; and John F. Jeune adopted the surname of Symons-Jeune. About the year 1910, parts of the testator's Somersetshire estates were sold and some of the proceeds of sale were invested in the purchase of other lands including Runnymede House in the county of Berks with land attached thereto.

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The following particulars of the property appointed by John F. Symons-Jeune were contained in an exhibit to an affidavit of the plaintiff Bertram Symons-Jeune.

Part 1.—Runnymede House in the counties of Berks and Bucks, with land attached containing 24 acres 1 rood 14 poles and also a small plot of leasehold land adjoining.

Part 2.—Lands and farms at East Brent and South Brent (now known as Brent Knoll) and at Weare and Cheddar in the county of Somerset: capital moneys consisting of the sums of 6267*l.* 17*s.* 6*d.* and 1939*l.* 4*s.*

Part 3.—Lands at Vale Mark in the county of Somerset and capital moneys represented by 509*l.* cash, and investments of the value of about 6000*l.*

John F. Symons-Jeune in exercise of his power of appointment under the will of Dr. Symons made the following appointments:—

By deed dated June 23, 1913, upon the marriage of his daughter, John F. Symons-Jeune appointed that the lands and capital moneys specified in Parts 1 and 2 of the foregoing particulars of the appointed property, should stand charged upon his decease with the payment to his daughter of 10,000*l.* and the death duties thereon with interest and demised the lands so charged to trustees for the term of 500 years from his decease upon trust for raising the same.

By an indenture of settlement dated February 25, 1924, John F. Symons-Jeune appointed that the Runnymede estate specified in Part 1 of the foregoing particulars should (subject to the charge thereon and the term for securing the same appointed by the last mentioned deed) go and be to the use of his son Bertram Symons-Jeune for life with remainder to the use of that son's first and other sons successively according to seniority in tail with remainder to the use of his first and other daughters successively according to seniority in tail with divers remainders over. The limitations in that settlement did not exhaust the fee simple with the result that if the estates tail were not barred there were limitations under the will of Dr. Symons capable of taking effect.

By his will dated January 16, 1918, John F. Symons-Jeune appointed all the land and premises remaining unappointed to the use of his son Bertram absolutely; but by a codicil thereto dated May 8, 1924, that testator revoked the appointment made by his will in favour of his son Bertram and in lieu thereof appointed that after his death all the lands and premises remaining unappointed (which comprised the lands and capital moneys specified in Parts 2 and 3 of the foregoing particulars of the appointed property) should go and be to the use of his son Bertram during his life with the same limitations in remainder, ipsissimis verbis, as those upon which the R. estate was settled after the death of Bertram Symons-Jeune by the settlement of February 25. 1924.

John F. Symons-Jeune died on February 8, 1925, whereupon the 10,000*l.* charge became raisable. His son Bertram Symons-Jeune had a daughter, the infant defendant Marie Violet Pamela Symons-Jeune, so that on his father's death, under the will of Dr. Symons and the settlement of February 25, 1924 (subject to the 10,000*l.* charge and the term for securing the same), the plaintiff Bertram Symons-Jeune was tenant for life in possession and his daughter Marie was tenant in tail, expectant on his death, of the Runnymede estate; and under the will of Dr. Symons and the codicil to the will of John F. Symons-Jeune the same persons were similarly entitled to the Somersetshire estates and capital moneys, subject as to certain parts of the capital moneys and of those estates to the 10,000*l.* charge and the term for securing the same.

An originating summons was taken out by the plaintiff, as tenant for life in possession, under s. 93 of the Settled Land Act, 1925, for the determination of the following questions: (1.) Whether the defendants Robert Clement Bunbury and Richard Seymour Bunbury, the trustees of Dr. Symons' will, at the direction of the plaintiff, either as trustees of that will alone or as trustees by virtue of s. 31 of that Act of (i.) the compound settlement constituted by Dr. Symons' will and the settlement of February 25, 1924, or (ii.) of the compound

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settlement constituted by Dr. Symons' will and the codicil to the will of John F. Symons-Jeune, or (iii.) the compound settlement constituted by all those three instruments, might under s. 91 of the Act, discharge the whole of the 10,000*l.* and the death duties out of the capital moneys (whether charged or not) so as to exonerate therefrom the Runnymede estate and the Somersetshire estates; (2.) If the trustees were not so entitled under s. 91 of the Act, whether the Court would make an order under s. 64 of the Act, for the application of the capital moneys for the purposes above mentioned; and (3.) Whether the defendants Robert C. Bunbury and Richard S. Bunbury were the proper persons to execute a vesting deed or separate vesting deeds of (*a*) the lands settled by the will of Dr. Symons and the settlement of February 25, 1924, and (*b*) the lands settled by that will and the codicil to the will of John F. Symons-Jeune.

Nicholson Combe for the plaintiff. The trustees, in the circumstances, have authority under s. 91 of the Settled Land Act, 1925, to discharge the 10,000*l.* incumbrance out of the capital moneys, whether those moneys are or are not charged with that incumbrance. If the trustees are not so authorized by s. 91 without an order of the Court, it is submitted that the Court will make an order, in this case, under s. 64, because nobody can be damnified by the application of the moneys in the manner proposed. In this case there are two different settlements within the meaning of s. 91. Both settlements are compound settlements, the will of Dr. Symons being an instrument common to each of the settlements. The limitations of that will are subsisting as regards each of the two settled estates, because each appointment ended with an entailed limitation and did not exhaust the fee. The defendants R. C. Bunbury and R. S. Bunbury are the trustees for the purposes of the Act of each of those two compound settlements.

There is no definition of a compound settlement given by the Act, unless it can be said that s. 1 and s. 31 furnish some sort of definition. The trustees of Dr. Symons' will, having

power to sell the settled land, are by virtue of s. 30, sub-s. 1 (i.), trustees of a settlement for the purposes of the Act and, as such, are by virtue of s. 31, sub-s. 1, trustees for the purposes of the Act of the compound settlement constituted by Dr. Symons' will and the codicil to the will of John Frederick Symons-Jeune as regards the land settled by those two instruments, and so also, in like manner, they are trustees for the purposes of the Act of the compound settlement constituted by Dr. Symons' will and the deed of settlement of February 25, 1924, as regards Runnymede, the land settled by those two instruments. References in the Act to a settlement are to be construed as references to a compound settlement where there is a compound settlement: see the proviso at the end of s. 1, sub-s. 1, of the Settled Land Act, 1925.

This is not a case of one compound settlement consisting of the will of Dr. Symons, the settlement of February 25, 1924, and the codicil of J. F. Symons-Jeune, although *In re Byng's Settled Estates* (1) and subsequent cases founded on that decision might point to that conclusion. Those cases were decided on the old Settled Land Act code, and I submit that the Legislature has, by enacting s. 91, shown its disapproval of those decisions, and rightly, for the settled land in each case was different. The Runnymede estate is not affected by the codicil and, contrariwise, the other estate is not affected by the settlement of February 25, 1924. Further, s. 91, by expressly allowing the application here proposed, impliedly enacts that, but for the express power, such application would be unauthorized. It would be authorized if there were here one compound settlement consisting of the three instruments. Therefore, the present is not a case of one compound settlement consisting of those three instruments.

The Somersetshire estates and the Runnymede estate being settled by those two different compound settlements and upon the same limitations and the trustees of each being the same persons, those trustees are trustees of the

(1) [1892] 2 Ch. 219.

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settlement of the aggregate estate for all the purposes of the Act and have power under s. 91, sub-s. 1 (ii.), of the Act to apply the capital moneys in Part 3 of the exhibit which are not charged under the deed of June 23, 1913, as if the same had arisen from the estates comprised in Part 2 thereof which are charged by that deed. No order of the Court is required, because the proviso contained in sub-s. 2 of s. 91 does not in words apply, as it cannot be predicated of either of the estates that one of them is subject to a charge to which the other is not subject; the 10,000*l.* being charged on the whole of one estate and on part of the other. The proviso was evidently aimed against the mischief referred to by Romer J. in *In re Lord Monson's Settled Estates* (1)—namely, the possibility of a mortgagor of estate B. who is tenant for life of settled estate A. settling the worthless equity of redemption of estate B. and thus freeing himself from his personal liability as mortgagor by throwing the whole liability to pay the mortgage debt on to estate A. The proviso, if construed as I submit it should be, stands as a complete barrier against that mischief.

The proper persons to execute the vesting deeds are the trustees of the two compound settlements.

J. M. Paterson for the trustees of Dr. Symons' will.

H. V. Batchelor for the defendant Marie V. P. Symons-Jeune (the infant tenant in tail) and George Whitley, the trustee of the will of John Frederick Symons-Jeune deceased, offered no opposition, as the proposed application of the capital moneys could not prejudicially affect the infant defendant's interests.

CLAUSON J. This is an originating summons in the matter of certain lands settled by the will of Dr. Benjamin Parsons Symons and the will of John Frederick Symons-Jeune and in the matter of certain lands settled by the will of Dr. Symons and a deed of appointment executed by John Frederick Symons-Jeune and in the matter of the Settled Land Act, 1925.

(1) [1898] 1 Ch. 427, 432.

In order to explain what is asked for by the summons, I ought to state that the first mentioned lands—namely, those settled by the two wills, are to be found described in Parts 2 and 3 of the exhibit "C," which is in evidence before me. The secondly mentioned lands—namely, those settled by the will of Dr. Symons and the deed of February 25, 1924, executed by John Frederick Symons-Jeune, are described in Part 1 of the same exhibit. There is a charge of 10,000*l.* which was created by a deed of June 23, 1913, which operated as an appointment under the special power of appointment given by the will of Dr. Symons to John Frederick Symons-Jeune. That appointment resulted in the creation of a charge for 10,000*l.* in favour of the appointor's daughter, Mrs. Hanbury. 10,000*l.* is charged by that deed of appointment upon part of the first mentioned land, that is, the land described in Part 2 of the exhibit, which was settled by the two wills, and upon the whole of the secondly mentioned land, that is, the land described in Part 1 of the exhibit, which was settled by Dr. Symons' will and the deed of 1924.

Without going through the documents themselves, it is sufficient to say that under the will of Dr. Symons the property was settled, but subject to a special power of appointment given to his great-nephew John Frederick Symons-Jeune exercisable by deed or will; and the difference between the appointment of the land in Parts 2 and 3 and the appointment of the land in Part 1 is that, in one case, the power was exercised by John Frederick Symons-Jeune by will and in the other by deed. He did, in fact, in each case appoint in favour of precisely the same persons and upon precisely the same limitations: and the 10,000*l.* is charged upon the whole of the property appointed by the deed and on part of the property appointed by the will. All the persons beneficially interested in the property being precisely the same, it can make no difference to anybody whether the 10,000*l.* is paid off wholly out of the property upon which it is charged or whether it is satisfied in part out of the property upon which it is charged and in part out of capital moneys representing the property upon which

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it has not been charged. The trustees, however, had to act regularly; and, accordingly, this summons was taken out for the determination of the questions involved. I ought to mention, in order further to explain the position, that, so far as the first mentioned lands are concerned which are settled by the two wills, the settlement contains certain capital moneys and investments, which would together suffice to pay off the 10,000*l.* incumbrance, but the incumbrance is charged upon part only of those capital moneys. The real point is that it is obviously desirable that the incumbrance should be paid off out of investments available as capital moneys.

It is contended by counsel on behalf of the tenant for life, and I can see no answer to the contention, that the lands described in Parts 2 and 3 and the land described in Part 1 are settled by different settlements. The settlements are different for the reason that "the settlement" in the Settled Land Act, 1925, if in relation to land which is the subject of a compound settlement, is to be construed as meaning a compound settlement, unless the context otherwise requires. That appears as a proviso to sub-s. 1 of s. 1 of the Settled Land Act, 1925. A "compound settlement" is not defined anywhere, but I think I am bound to hold that where land is settled by a will, coupled with a subsequent document exercising a special power of appointment under the will, the land is settled by a compound settlement consisting of the will and of the document which exercises the power. Equally I can see no escape from the conclusion that where a power of appointment has been exercised by two separate documents, as in the present case—namely, as regards part of the property by will and as regards other part of the property by a deed, the result is that each part is settled by a compound settlement; and, accordingly, there are two distinct compound settlements, notwithstanding that the first document in the case of each compound settlement is the same—namely, the will of Dr. Symons.

Accordingly, in my opinion, in this case, the first mentioned lands on the one hand and the secondly mentioned lands

on the other are settled by different settlements; that is to say, by different compound settlements; they are however settled, without question, upon the same limitations. The result of that is that by reason and in the words of s. 91, sub-s. 1, sub-cl. (ii.): "All or any part of the capital money arising from one of the estates may be applied by the direction of the tenant for life or statutory owner as if the same had arisen from any other of the estates." So that, if I am right in saying that the lands described in Parts 2 and 3 of the exhibit and the lands described in Part 1 are settled by different settlements, although upon the same limitations, the tenant for life may apply capital moneys arising in respect of land settled by one settlement to discharge incumbrances which are not charged upon those capital moneys, but are charged on land comprised in either compound settlement. In this case the trustees for the purposes of the Act of the two compound settlements are the same persons and, accordingly, they are trustees of the settlement for the aggregate estate for the purposes of the Act. That again flows from s. 91, sub-s. 1, sub-cl. (ii.).

There is, however, a point with which I must deal. Subsect. 2 of s. 91 is as follows: "Estates shall be deemed to be settled upon the same limitations, notwithstanding that any of them may be subject to incumbrances, charges, or powers of charging to which the other or others of them may not be subject": "Provided that, in any such case as last aforesaid, the powers of this section relating to the payment or application of capital money shall not, unless the settlement under which the capital money is held otherwise provides, be exercisable without an order of the Court."

Now it might be suggested that this is a case to which that sub-section and its proviso applies, and a case in which capital moneys can be applied in the way proposed only under an order of the Court. In my opinion the sub-section does not apply to this case for the reason that it cannot be truly said that the land comprised in either of the two settlements is subject to an incumbrance to which the other is not subject; because, although the incumbrance does not

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cover the whole of the lands in each of the settlements, it covers the whole of the land in one and part of the land in the other. Therefore, in my judgment, this case is without sub-s. 2, and no order of the Court is required to provide for that which it is proposed to do.

Accordingly, I propose to make an order for the reasons which I have endeavoured to indicate, declaring that the defendants Robert Clement Bunbury and Richard Seymour Bunbury, at the direction of the plaintiff as tenant for life, as trustees of these two settlements constituted (1.) by Dr. Symons' will and John Frederick Symons-Jeune's will, and (2.) by Dr. Symons' will and the deed of appointment of 1924, may under s. 91 of the Act, and notwithstanding sub-s. 2 thereof, discharge the whole of the sum of 10,000*l.* and all death duties and interest payable in respect thereof charged by the deed of June 23, 1913, out of capital moneys, whether so charged or not, in the hands of the trustees, and so as to exonerate therefrom the lands settled by either of the two compound settlements.

My decision on the first question renders it unnecessary for me to deal with question 2 of the summons, and on that question no order will be made.

There is no dispute who are the proper persons to make the vesting deed. As regards the lands comprised in each of the settlements, it is clear that the right persons are the trustees whom I have named, and that the lands ought to be comprised not in one vesting deed but in two vesting deeds, one relating to the land settled by each of the two compound settlements.

The costs will be borne out of capital moneys subject to either of the compound settlements.

Solicitors for all parties: *Prideaux & Sons, for J. Ruscombe Poole & Son, Bridgwater.*

H. C. H.

In re SHAER.

C. A.
1926
June 21.

[297 of 1926.]

Bankruptcy—Business Name—Failure of petitioning Creditor to register—Disability to enforce business Contract—Power of High Court to grant Relief at or after Judgment—Retrospective Effect—Registration of Business Names Act, 1916 (6 & 7 *Geo.* 5, *c.* 58), *s.* 8.

Under s. 8, sub-s. 1, of the Registration of Business Names Act, 1916, the Court has power to grant relief from the disability attaching to a contract, through failure of the plaintiff to register under the Act, in all proceedings on the contract not only up to judgment but also after judgment has been signed; and the relief so granted is retrospective in effect so as to restore the contract ab initio to the category of contracts enforceable at law and validate all subsequent proceedings in respect of it.

Hawkins v. *Duché* [1921] 3 K. B. 226 approved on this point.

Appeal from a receiving order in the following circumstances :—

The creditor, a Pole, whose real name was Moysiez or Moses Silbermann, had in his trade name of Morris Silverman sued the debtor, Abraham Shaer, for 217*l.* 10*s.* 9*d.* for flour sold and delivered to the defendant. In his affidavit in support of his application to sign judgment under Order xiv. he swore that the affidavit was in his trade name. In fact, he had not registered his trade name under the Registration of Business Names Act, 1916. He obtained leave from the Master to sign judgment for 120*l.*, unless the defendant paid that sum into court, and the rest of the action was remitted to the county court. The 120*l.* was not paid into court, and the creditor signed judgment. The debtor appealed, and Fraser J. affirmed the order, and at the same time granted the creditor relief under s. 8 of the Registration of Business Names Act, 1916, from any disability in respect of the contract sued upon.

The creditor then filed a petition in bankruptcy against the debtor, and the registrar made a receiving order, notwithstanding the debtor's objection, that relief after judgment could not be granted under the Act.

The debtor now appealed, his ground of appeal being the

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objection taken before the registrar. The appeal was heard on June 21, 1926.

E. C. Morey for the appellant. The power of the Court to grant relief under the proviso to s. 8, sub-s. 1, of the Registration of Business Names Act, 1916, does not, I submit, extend to granting relief after judgment given. *Hawkins* v. *Duché* (1) only shows that the judge may grant relief after the action is begun as well as before the writ is issued; that is, while proceedings are pending. If the Act meant that a judgment already given could be validated by a subsequent grant of relief, it should have said so in plain terms: s. 210 of the Common Law Procedure Act, 1852, enabled the Court to give relief after judgment, and is an instance in support of my contention. The Conveyancing Act, 1881, s. 14, now replaced by s. 146 of the Law of Property Act, 1925, enables the Court to give relief during the proceedings, and is not so strong as s. 210 of the Common Law Procedure Act, but shows that relief cannot be given to a lessee after judgment. In *Brown* v. *Thomas & Burrows* (2), which was a decision under this Act, the facts show that judgment had not been signed. The proviso to sub-s. 2 of s. 8 of the Act, giving a county court power to grant relief, applies in terms to pending proceedings only. In the present case the contract is merged in the judgment, which stands unless reversed on appeal.

E. H. Coumbe for the respondent.

LORD HANWORTH M.R. In this case the appeal must be dismissed, because we agree with the decision to which the registrar has come. [His Lordship stated the facts and the order made by Fraser J. and continued:] Fraser J.'s order stands good, and there has been no appeal from it. It was pointed out at the time before Fraser J. that s. 8, sub-s. 1, of the Registration of Business Names Act, 1916, created a disability in Morris Silverman from proceeding in his action, but Fraser J. made an order which was comprehensive in its terms, because he ordered that relief should be granted to the plaintiff in respect of the contract upon which he was suing.

(1) [1921] 3 K. B. 226. (2) [1923] W. N. 6; 39 Times L. R. 132.

Sect. 8 is in wide terms, and gives power to the defaulter to apply for relief, and power to the Court to grant relief, either generally or in respect of any particular contracts on such conditions as the Court may impose. Fraser J. granted relief generally in respect of the contract in question, and that relief got rid of the disability from which the plaintiff was suffering, because when the relief was granted he ceased any longer to be a defaulter under the Act and his disability was removed.

It is said that owing to the non-registration of this trade name all the proceedings in this case have been abortive, and inasmuch as judgment has been given in respect of the 120*l.*, and that judgment has been passed and entered, it is not possible for relief to be given after that and for the creditor to be rehabilitated into the position he would have occupied if he had duly registered. That contention amounts to accepting the Act from one point of view and discarding it from another. In my judgment the effect of the order made by Fraser J. granting relief was to prevent the disability imposed by s. 8 of the Act from applying to the creditor at all in respect of this contract, and to enable valid proceedings to be taken and a valid judgment obtained in respect of the contract. The effect of that relief was to rehabilitate the proceedings from the beginning, and consequently the writ and the order for payment were validated.

That result is in accord with the decision of McCardie J. in *Hawkins* v. *Duché* (1) upon the first point which arose in that case. The further point taken in that case does not now arise and I say nothing about it.

For the reasons I have given, the order of Fraser J. was effective to rehabilitate all the proceedings on this contract, with the result that the subsequent petition and receiving order in bankruptcy have been made valid.

I also agree with the learned registrar that there was no question that the debtor knew who the creditor was with whom he was dealing, and knew also that he owed the money for the goods which were sold and delivered to him. In the

(1) [1921] 3 K. B. 226.

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circumstances one could have little sympathy for him, and the appeal, which is without merits, must be dismissed.

WARRINGTON L.J. The question is whether the effect of the order for relief under s. 8 of the Registration of Business Names Act, 1916, is retrospective so as to validate proceedings taken under an order obtained in an action brought by the defaulter who had not complied with the requirements of the Act as to registration.

Sect. 8 of the Act imposes on every contract made or entered into by or on behalf of the defaulter the peculiar character that the rights of the defaulter under or arising out of that contract shall not be enforceable by action or other legal proceedings either in the business name or otherwise. Then that disability is qualified by a proviso that "the defaulter may apply to the Court for relief against the disability imposed by this section, and the Court, on being satisfied that the default was accidental"—then follow various other grounds for relief—"may grant such relief either generally or as respects any particular contracts," on certain conditions. That seems to me to mean that the defaulter may apply to have that character of the contract, which prevents any rights of the defaulter under or arising out of it from being enforceable by action or other legal proceedings, removed so as to replace that contract in the original category of contracts enforceable at law. When you come to see what the proviso entitles the Court to do, I think that that view becomes abundantly clear, because the judge is entitled, if he so pleases, to grant the relief "generally," which is the expression used in the Act.

In my opinion the effect of granting the relief generally is to put the defaulter exactly in the same position with regard to all contracts made by him relating to the business in respect of which he was a defaulter as if the Act had never been passed. But as well as granting relief generally, the judge has power to grant relief as respects any particular contract. Fraser J. has granted relief in respect of the particular contract sued upon in the action, but if a judge

C. A. 1926 SHAER, *In re.* Warrington L.J

has granted relief in respect of any particular contract, the nature of the relief is the same as if he had granted it generally, and the result of that is to remove altogether the disability in respect of that particular contract and to restore it to the category of enforceable contracts. To my mind that is the true construction of the section. That being so, the proceedings in the present case—the writ, the proceedings in the action, the judgment and the appeal affirming it—are all rendered effective, and the petition in bankruptcy and the consequent receiving order are validated.

It is a satisfaction to know that the view which I have expressed accords with the invariable practice of the judges of the King's Bench Division who have to deal with these matters and have followed it since the passing of the Act. That practice was never questioned until *Hawkins* v. *Duché* (1), in which McCardie J. affirmed the principle upon which this Court is now acting.

I think that the order against which this appeal has been brought was correct, and that the receiving order was properly made and that this appeal must be dismissed.

SARGANT L.J. I am of the same opinion. This statute must be construed broadly, because there must be many cases in which a technical breach has been committed and no hardship has been suffered by the other party, and the present appears to be one of those cases. Any possible hardship to any person so contracting is amply guarded against by the full power given to the Court of imposing conditions on the grant of relief. I agree also with Warrington L.J. that the effect of granting relief is to validate the contract ab initio, and to reinstate the defaulter as respects the contract, as if he had not been under any original disability.

In this case it is to be observed that at the time when Fraser J. granted relief, the judgment in which the Master had made an order was under appeal to Fraser J., so that the action was then before him, and simultaneously with

(1) [1921] 3 K. B. 226.

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granting relief under s. 8 against the disability, he also affirmed the judgment for payment made by the Master, and in those circumstances I doubt whether it is really a case of relief having been granted after judgment had been given.

Solicitor for the appellant: *W. H. Lane.*
Solicitor for the respondent: *J. Howard Smith.*

R. M.

ASTBURY J. 1927 *Jan.* 13, 14.

In re ALEFOUNDER'S WILL TRUSTS.

ADNAMS *v.* ALEFOUNDER.

[1926. A. 2124.]

Settled Land—Estate Owner—Equitable Tenant in Tail—Same Person—Equitable Entail barred—Cesser of Settlement—Power to sell legal Fee Simple without a vesting Deed—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *ss.* 13, 112, *sub-s.* 2—*Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20).

On December 16, 1925, the defendant Alefounder became entitled to settled estates as adult legal tenant in tail in possession, with remainders over, but without any overriding trusts or incumbrances.

On January 1, 1926, when the new property legislation came into force, he automatically became estate owner, holding the legal fee simple in trust for himself as equitable tenant in tail with remainders over, but still without any overriding trusts or incumbrances:—

Held, that if he barred his equitable entail, and so put an end to the settlement, he could make a valid disposition of the property as absolute legal owner in fee simple, without first obtaining a vesting deed pursuant to s. 13 of the Settled Land Act, 1925, which section, having regard to s. 112, sub-s. 2, applies only to dispositions under that Act.

ORIGINATING SUMMONS.

On the true construction of the will of R. S. Alefounder, who died on December 16, 1864, and in the events that happened, the defendant Alefounder on December 16, 1925, became entitled as adult legal tenant in tail in possession to the estates settled by the will, with remainders over, but without any overriding trusts or incumbrances.

He could then have barred the entail and made himself absolute legal owner in fee simple.

On January 1, 1926, when the new property legislation came into force, he automatically became estate owner in legal fee simple and equitable tenant in tail.

The question arose whether if he barred his equitable entail he could then make a valid disposition of the legal estate as absolute legal owner in fee simple, or whether he must make use of the simplifications introduced by the new legislation and first obtain a vesting deed pursuant to s. 13 of the Settled Land Act, 1925.

On October 7, 1926, the Settled Land Act trustees issued this summons to determine this and other points arising on the will.

H. H. King for the Settled Land Act trustees. Under the Law of Property Act, 1925, s. 1, and Sch. 1, Part 1, the defendant Alefounder's legal estate tail became an equitable estate tail. The land is obviously settled land under the Settled Land Act, 1925, s. 1, sub-s. 1, cl. i. or ii. (*a*).

The defendant has the powers of a life-tenant under s. 20, sub-s. 1, cl. i. He is therefore deemed a life-tenant under s. 117, sub-s. 1, cl. xxviii., which clause is incorporated by the Law of Property Act, s. 205, sub-s. 1, cl. xxvi. As such he is entitled to require a principal vesting deed under the Settled Land Act, 1925, Sch. 2, para. 1, s. 2, and therefore the estates vested in him automatically at once as estate owner under the Law of Property Act, 1925, Sch. 1, Part 2, ss. 3, 5, 6 (*c*).

He is therefore estate owner and holds the legal fee simple in trust for himself as equitable tenant in tail with remainders over, but without any overriding trusts or incumbrances. If he bars the entail which, under s. 133 of the Law of Property Act, 1925, he can now do without enrolment, he will become equitable tenant in unincumbered fee simple in possession. His equitable fee simple will merge in his legal fee simple, so that prima facie he can then convey the land as absolute owner, the settlement having come absolutely to an end.

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ALE-FOUNDER'S WILL TRUSTS, *In re.*
ADNAMS *v.* ALE-FOUNDER.

The difficulty in the case is merely caused by s. 13 of the Settled Land Act, 1925. That section, as amended by the Law of Property Act, 1926 (16 & 17 Geo. 5, c. 11), s. 6 and Schedule, provides that: "Where a tenant for life or statutory owner has become entitled to have a principal vesting deed or a vesting assent executed in his favour, then until a vesting instrument is executed or made pursuant to this Act in respect of the settled land, any purported disposition thereof inter vivos by any person, other than a personal representative (not being a disposition which he has power to make in right of his equitable interests or powers under a trust instrument), shall not take effect except in favour of a purchaser of a legal estate without notice of such tenant for life or statutory owner having become so entitled as aforesaid, but, save as aforesaid, shall operate only as a contract for valuable consideration to carry out the transaction after the requisite vesting instrument has been executed or made, and a purchaser of a legal estate shall not be concerned with such disposition unless the contract is registered as a land charge.

Nothing in this section affects the creation or transfer of a legal estate by virtue of an order of the Court or the Minister [of Agriculture and Fisheries] or other competent authority."

But this section cannot apply to this case for two reasons :—

In the first place on the disentail the settlement will come to an end. There will be no settlement, settled land, life-tenant or person empowered to appoint new trustees, and it will be impossible to draw a vesting deed in accordance with s. 5.

Secondly, the disposition referred to in s. 13 is confined to a disposition under the Settled Land Act, 1925: see s. 112, sub-s. 2. The disposition by the defendant after he has made himself absolute owner will be altogether outside the Act.

C. J. Parton for the defendant in tail adopted the above argument.

H. S. G. Buckmaster for parties not interested in this point took no part in this argument.

ASTBURY J. [after stating the facts:] The question is whether the defendant Alefounder on barring his equitable entail can make a valid title without first having a vesting deed. This interesting question is considerably complicated by the simplifications introduced by the new property legislation.

At the end of 1925 the defendant was an adult legal tenant in tail in possession, with remainders over, but without any overriding trusts or incumbrances.

On January 1, 1926, by virtue of s. 1, and Sch. 1, Part 1, of the Law of Property Act, 1925, his legal estate tail became an equitable estate tail which, having regard to s. 133, he could bar without enrolment. But until this was done the land remained settled land under the Settled Land Act, 1925, s. 1, sub-s. 1, clauses i., ii. (*a*).

Under s. 20, sub-s. 1, cl. i., and s. 117, sub-s. 1, cl. xxviii., of the Settled Land Act, 1925, which latter clause is incorporated in s. 205, sub-s. 1, cl. xxvi., of the Law of Property Act, 1925, he is deemed a life-tenant with the consequent power of requiring a principal vesting deed under Sch. 2, para. 1, s. 2, of the Settled Land Act, 1925. The estates have therefore vested in him automatically as estate owner under the Law of Property Act, 1925, Sch. 1, Part 2, ss. 3, 5, 6 (*c*).

He therefore holds the absolute legal fee simple in trust for himself as equitable tenant in tail with remainders over, but without any overriding trusts or incumbrances, and not unnaturally wants to know whether if he bars his equitable entail and so puts an end to the settlement he can make a valid disposition of the property without first obtaining a vesting deed, which as a tenant in tail he is entitled to require.

The difficulty, if any, is caused by s. 13 of the Settled Land Act, 1925. [His Lordship read the section, already set out in the argument.] It has however been rightly contended that on its true construction this section cannot have been intended to prevent a valid disposition in such a case as the present—namely, where the defendant is estate owner in law, and on barring his equitable entail will become equitable owner in unincumbered fee simple in possession.

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This contention is right for the following combined reasons. In the first place, on the disentail in this case the land will cease to be settled land, and the settlement will come to an end. It is difficult to see how any vesting deed containing the particulars required by s. 5 could possibly be drawn after the cesser of the settlement. Secondly, the purported disposition referred to in s. 13 means and only means a disposition under the Settled Land Act, 1925: see s. 112, sub-s. 2.

For these reasons, taken together, there will be a declaration that on the defendant Alefounder disentailing his equitable estate tail, and so becoming entitled to the unincumbered legal and equitable fee simple in possession free from any settlement or trust, he can dispose of the property without regard to s. 13 and without previously obtaining a vesting deed.

Solicitors: *Albert M. Oppenheimer, for Steward, Rouse, Vulliamy & Son, Ipswich; Merton Jones & Lewsey.*

G. R. A.

CLAUSON J. 1926 *Nov.* 11.

In re SIKES.

MOXON *v.* CROSSLEY.

[1926. S. 1798.]

Will—Construction—Specific Legacy—Bequest of "my piano"—Wills Act, 1837 (1 Vict. c. 26), s. 24.

A bequest of "my piano" by a testatrix who at the date of her will was in possession of a piano which she afterwards sold will not pass a piano subsequently acquired and in her possession at the time of her death; the expression "my piano" being a sufficient indication of a contrary intention within the meaning of s. 24 of the Wills Act, 1837.

HANNAH M. SIKES, who died on February 14, 1926, made her will dated June 4, 1921, which contained several pecuniary legacies, including one of 2000*l.* to her friend Beatrice

Elizabeth Leigh: she then made the following bequest: "I bequeath my piano to Beatrice Elizabeth Leigh and my table linen and also my kitchen furniture and cooking utensils together with my trinkets and jewellery to be divided equally between the said Alice Scarborough and Beatrice Elizabeth Leigh." The testatrix bequeathed her residuary estate equally between two charitable institutions.

At the time she made her will the testatrix possessed a piano which had been converted into a "player" piano. At the beginning of May, 1923, she sold it for 5*l.* to Mr. Crossley, to whom Miss B. E. Leigh was married in 1922, and about the end of the same month, the testatrix purchased a piano known as an electric motor player piano for 228*l.* 18*s.*, which was in her possession when she died.

The summons was taken out by the trustees of her will to have the question determined whether the new piano, which was in the possession of the testatrix at the time of her death, passed to the defendant Mrs. Beatrice Elizabeth Crossley under the bequest to her of "my piano."

R. H. Hodge for the plaintiffs.

F. R. Evershed for the defendant Mrs. Crossley. The piano in the possession of the testatrix at the time of her death was effectually bequeathed. Roper on Legacies, 4th ed., vol. i., p. 342, contains this statement: "If the testamentary words relate to the period of his death . . . . every article disposed of between the date of the will and the death of the testator will be an ademption; but if they be replaced by others or be increased, the new articles will pass." In *Goodlad* v. *Burnett* (1) Wood V.-C. found a difficulty in saying that a contrary intention did not appear when the bequest was of "my ring" or "my horse." But he distinguished such an instance from one where the subject-matter was generic, and in *In re Gibson* (2) he expressed a similar view. But in *Castle* v. *Fox* (3) Malins V.-C., on the other hand, said that he had no doubt that if a testator gave his house in

(1) (1855) 1 K. & J. 341, 348, 349. (2) (1866) L. R. 2 Eq. 669.
(3) (1871) L. R. 11 Eq. 542, 551.

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Grosvenor Square, the house in Grosvenor Square at his death would pass. There was no sufficient indication on the face of the will that the piano she possessed at her death and which merely took the place of the one she had at the date of her will, was not to pass. The case was distinguishable from *In re Clifford*. (1) There the subject-matter of the gift was a specific number of shares and not anything generic capable of increase, decrease, or substitution, while the subject-matter of the gift in the present case was an article of ordinary use susceptible of change. The gift was not necessarily of the particular piano belonging to the testatrix when she made her will, but was a gift of any piano which might happen to be hers. The true test is whether in ordinary language and in an ordinary context the expression used is capable of referring equally to a subject-matter of the same kind possessed at a future time—e.g., date of death—and to the subject-matter actually possessed at the time of speaking —e.g., date of will. Thus, the expression "I always keep my piano in my drawing room" would normally be taken to refer to any piano possessed for the time being: and the same thing applies to any other subject-matter of a generic nature, such as "my motor car," of which a normal establishment possesses only one, but not always the same one. It is of course otherwise, if the subject-matter is more specifically pointed out, e.g., "my Steinway piano," "my brown horse": see Hawkins on Wills, 3rd ed., p. 27. And in this case the rule "noscitur a sociis" will apply in Mrs. Crossley's favour. The onus, after all, lies upon the residuary legatees to show a contrary intention on the face of the will.

Wilfrid M. Hunt for the residuary legatees. The principle to be applied is well stated by Swinfen Eady J. in *In re Clifford* (2): "Where the bequest is not capable of increase or decrease, and is specific, the will on the face of it shows a contrary intention within section 24." The gift is of a specific article which the testatrix possessed when she made her will; and that is a sufficient indication of a contrary intention to take the case out of s. 24 of the Wills Act.

(1) [1912] 1 Ch. 29. (2) [1912] 1 Ch. 33.

CLAUSON J. I am of opinion that when making the bequest of "my piano," the testatrix referred to a particular thing (to borrow the language used by Wood V.-C. in *Goodlad* v. *Burnett* (1)), and intended to give the particular piano then in her possession and no other. That, in my judgment, constitutes a contrary intention sufficient to take the bequest out of the operation of s. 24 of the Wills Act, 1837, with the result that the piano which she possessed at her death did not pass under the bequest of "my piano."

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Solicitors: *Helliwell, Harby & Evershed, for Jubb, Booth & Helliwell, Halifax; Crossman, Block, Matthews & Crossman.*

H. C. H.

STONEY *v.* EASTBOURNE RURAL DISTRICT COUNCIL.

C. A. 1925 ROMER J. *Nov.* 18, 19; *Dec.* 17. C. A. 1926 *April* 28, 29.

[1924. S. 5295.]

Vendor and Purchaser—Conveyance as "Beneficial owner"—Implied Covenants for Title—Innocent Vendor—Damages for Breach—Public Right of Way over Property established after Conveyance—No Purchaser for Value in Vendor's Title since 1782*—Proof of Dedication after* 1782 *—Onus on Purchaser—Evidence of User since* 1850*—Presumption of Time of Dedication—Maps of* 1802 *and* 1840*—Proper Custody—No Right of Way shown—Tithe Map—Admissibility of Reputation in Question of private Right—Purposes for which Maps made—No prima facie Evidence to displace Onus—Conveyancing Act,* 1881 (44 *&* 45 *Vict. c.* 41), *s.* 7, *sub-s.* 1 (*A*).

In 1921 the plaintiff purchased a farmhouse and lands at Westham, Sussex, from the Duke of Devonshire who, as "beneficial owner," conveyed the same to her in fee simple. In 1924 a public right of footway, the existence of which over the property was unknown to the Duke and the plaintiff at the time of sale, was established in an action by the plaintiff against the defendant council, who proved acts of public user extending back to 1850. The plaintiff having joined the Duke as defendant in that action, then sued him for damages for breach of his implied covenants for title, and sought to prove dedication by him or his predecessors in title subsequent to 1782, back to which date it was known and admitted that there had been no purchaser for value in the Duke's chain of title.

(1) 1 K. & J. 341, 348.

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The plaintiff contended (*a*) that inasmuch as the evidence of public user went no further back than 1850, dedication must be presumed in or about that year, and (*b*) that two maps on which she relied, dated respectively in 1802 and 1840, neither of which showed the right of way in question, were evidence that dedication must have been subsequent to 1782, or were at any rate sufficient prima facie evidence to shift the onus of proof on to the Duke.

The earlier map came from the Duke's muniment room and was intituled "plan of the parish of Westham the great tythe of which was the property of Lord George Henry Cavendish" (one of the Duke's predecessors in title) "describing more particularly his Lordship's own estates in the said parish and also in" certain adjoining parishes, "Surveyed by P. Potter 1802." The later map was the tithe map of 1840, which the plaintiff tendered as evidence of reputation upon a matter of public right:—

Held, by the Court of Appeal: (1.) That the words "otherwise than by purchase for value" in the implied covenant for title were not an exception from the covenant but were part of the covenant itself, and that the onus was on the plaintiff to prove that the dedication was made by some person through whom the Duke claimed otherwise than by purchase for value.

David v. *Sabin* [1893] 1 Ch. 523 and *The Glendarroch* [1894] P. 226 applied.

(2.) That user being merely the evidence that proved dedication, dedication could not be presumed to have taken place after 1782 merely because the evidence of user did not extend back beyond living memory.

Winterbottom v. *Lord Derby* (1867) L. R. 2 Ex. 316 followed.

Turner v. *Walsh* (1881) 6 App. Cas. 636 explained.

Decision of Romer J. on these points affirmed.

(3.) That assuming, without so deciding, that the map of 1802 was admissible in evidence, the map could not be accepted as affirmative evidence that the footway in question was not then in existence, inasmuch as the map appeared to have been made alio intuitu and not for the purpose of showing all the public rights of way over the land.

Quaere, whether the map, although more than thirty years old and coming from the proper custody, was admissible in evidence at all in the absence of proof who P. Potter was, or what his qualifications were, or how or for whom he came to make the map.

(4.) That assuming that the tithe map of 1840 was admissible in evidence between the parties, it was made for a different purpose, and although it was satisfactory evidence of the matters therein recited or stated, or of its accuracy by virtue of s. 64 of the Tithe Commutation Act, 1836, it could not be accepted as evidence of the non-existence of a public right which might have been, but was not, inserted in it and was not relevant to the purpose for which the map was made.

Attorney-General v. *Antrobus* [1905] 2 Ch. 188 explained.

Quaere (*a*), per Lord Hanworth M.R., whether the public right of way having been already established, and this being an action between private persons, the question was not merely one of private right between the parties excluding hearsay evidence.

(*b*) Per Sargant L.J., whether the admissibility of hearsay evidence with regard to public rights is to be limited to an action in which the public rights are themselves involved, and does not also extend to actions between private persons whose rights are derived from, or are dependent upon, the existence of public rights at a previous time.

(5.) That in the circumstances the plaintiff had not produced sufficient prima facie evidence to discharge the onus of proving dedication subsequent to 1782, and that her action failed.

Decision of Romer J. on this point reversed.

WITNESS ACTION.

In July, 1921, the plaintiff purchased at public auction a small estate and house, originally a farm and farmhouse, called Peelings, at Westham, near Eastbourne. The farm and house had been successively in the occupation of farmers who had cultivated the land. The vendor was the Duke of Devonshire and the conditions of sale provided (inter alia) that "the lots are sold subject to all rates, outgoings and charges, and to all roads, ways, rights of way rights of light and all other rights and easements affecting the same, whether mentioned in the Particulars or in the Conditions of sale, or not."

In one of their requisitions on title the plaintiff's solicitors asked whether or not there was any right of way which affected the property. The vendor's solicitors replied: "Not to our knowledge." The purchase was completed on October 11, 1921, the vendor as beneficial owner conveying the property to the plaintiff in fee simple. The plaintiff entered into possession of the property and expended a considerable sum upon it, converting the farmhouse into a very desirable residence.

In 1924 there was the first assertion of a public right of way through the property. The way claimed was a right to pass from Hankham Lane through the entrance gate of Peelings and along close to where the stables were built, not far from the house, and then to bear to the right through a gate separating the farm buildings from a field, and then along an occupation road extending across the field in a southerly direction to Peelings Lane. The plaintiff contested the right, and on December 23, 1924, issued a writ against

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the Eastbourne Rural District Council, who had been active in asserting the right. The writ claimed a declaration that the alleged right of way did not exist and an order directing the defendants to withdraw their claim thereto.

On April 2, 1925, the writ was amended by joining as defendant the Duke of Devonshire, in order that if the plaintiff failed in her action against the assertion of the right of way, she might claim against the Duke for damages for breach of his covenants for title implied by law by his having conveyed as beneficial owner.

The action relating to the right of way was tried before Romer J. in July, 1925, and in October of that year he gave judgment against the plaintiff, holding that the right of way in question had been established. There had been no appeal against that judgment.

The action was then continued before him as against the defendant, the Duke.

It was admitted on behalf of the Duke that if the dedication of the footpath had been made by any person through whom he derived title otherwise than by purchase for value, he would be liable for damages for the breach of his covenants relating to his right to convey and for quiet enjoyment. It was definitely known, however, that from the year 1782 down to the date of the sale to the plaintiff there was never a purchaser for value of the Peelings property. Little was known of the earlier title, but it was possible that one or some of the owners before 1782 might have acquired the property as a purchaser or purchasers for value. If therefore the dedication of the right of way took place after 1782, the Duke was admittedly liable. If, however, the dedication was made before the last of the purchases anterior to 1782, it was conceded on behalf of the plaintiff that her claim must fail.

The question at issue between the parties, therefore, was—was the dedication made since 1782? If not, was it made subsequent to the last preceding purchase for value?

The plaintiff contended (1.) that dedication took place after 1782 because (*a*) the evidence of user went no further

back than 1850, and therefore dedication must be presumed in or about that year, and (*b*) two maps, one made in 1802 and coming from the Duke's muniment room, and the other the tithe map of 1840 did not show the way in question, and (2.) that if the evidence was not sufficient to justify such a conclusion, then the onus was on the Duke of proving that the dedication was made before the last purchase for value, and that if he failed (as admittedly he must fail) to discharge that onus, the plaintiff was entitled to succeed in her action.

The first map above mentioned was made in 1802 and came from the Duke's muniment room. It bore upon it part of the Cavendish crest and was intituled: "Plan of the Parish of Westham in the County of Sussex the Great Tythe of which is the property of The Right Honourable Lord George Henry Cavendish describing more particularly his Lordship's own estates in the said Parish and also those in the adjoining parishes of Willingdon, Folkington, Hailsham, Pevensey, Wartling and Bexhill. Surveyed by P. Potter 1802." Lord George Henry Cavendish was admittedly one of the Duke's predecessors in title. The map was produced at the trial, but nothing was known about P. Potter and there was no evidence to show that he was employed by Lord George Henry Cavendish. The map indicated the existence and position of certain bridleways and footpaths, but it did not show the particular public footway which formed the subject-matter of this action.

The second map above mentioned was the tithe map of 1840 prepared under the provisions of the Tithe Commutation Act, 1836, and came from the proper custody. It also indicated the position of other footpaths, but did not show the particular public footway in question.

The action came on for hearing before Romer J. on November 18, 1925.

Hughes K.C. and *R. A. Glen*, for the plaintiff, referred to the following authorities: *Turner* v. *Walsh* (1); *Winterbottom* v. *Lord Derby* (2); *Attorney-General* v. *Antrobus* (3);

(1) 6 App. Cas. 636. (2) L. R. 2 Ex. 316.
(3) [1905] 2 Ch. 188.

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Great Western Ry. Co. v. *Fisher* (1); *Moser* v. *Ambleside Urban Council* (2); *Rex* v. *West Sussex County Council* (3); *The Glendarroch.* (4)

Farwell K.C. and *Cecil Turner*, for the defendant Duke, referred to the following authorities: *Attorney-General* v. *Esher Linoleum Co.* (5); Davidson's Precedents in Conveyancing, 4th ed., vol. ii., pp. 231, 237 and 243; *David* v. *Sabin* (6); *Mann* v. *Brodie* (7); *Howard* v. *Maitland* (8); *The Glendarroch* (4); *Great Western Ry. Co.* v. *Fisher* (1); *Rolph* v. *Crouch* (9); *Turner* v. *Moon* (10); *Eastwood* v. *Ashton.* (11)

Cur. adv. vult.

1925. Dec. 17. ROMER J. Having arrived at the conclusion that at some time in the past the owner of Peelings dedicated a footpath to the public along the line already indicated, it now becomes necessary to consider the claim made in this action against the defendant, the Duke of Devonshire.

The land over which the footpath runs was conveyed to the plaintiff by the Duke by conveyance dated October 11, 1921, the Duke being expressed to convey as beneficial owner. The conveyance contains no reference to the existence of any right of way over the land, both the plaintiff and the Duke being unaware that there was any such right. The plaintiff had indeed by one of her requisitions on title inquired of the Duke's solicitors whether the property sold was subject to any right of way, and had received the answer: "Not to our knowledge."

Now that the existence of the right has been established in these proceedings, the plaintiff not unnaturally thinks that she ought to be compensated by the Duke by a return

(1) [1905] 1 Ch. 316.
(2) (1925) 89 J. P. 118; 23 L. G. R. 533.
(3) (1921) 85 J. P. 162; 19 L. G. R. 337.
(4) [1894] P. 226.
(5) [1901] 2 Ch. 647.
(6) [1893] 1 Ch. 523.
(7) (1885) 10 App. Cas. 378.
(8) (1883) 11 Q. B. D. 695.
(9) (1867) L. R. 3 Ex. 44.
(10) [1901] 2 Ch. 825.
(11) [1913] 2 Ch. 39; [1915] A. C. 900.

of a part of her purchase money or in some other way, being unable in the circumstances to see the justice of the Duke retaining the full purchase money that was paid by her and received by him in the common belief that there was no public right of way over the property. The Duke, however, does not see his way to make any concession, and it therefore becomes necessary to determine whether the plaintiff is entitled to recover damages from him for breach of the covenant for title implied in the conveyance by virtue of s. 7, sub-s. 1, of the Conveyancing Act, 1881. That covenant, so far as material, is as follows: "That notwithstanding anything by the Duke or any one through whom he derives title, otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the Duke has full power to convey the premises expressed to be conveyed . . . . and that, notwithstanding anything as aforesaid the premises shall remain to and be quietly entered upon, received, and held, occupied, enjoyed and taken, by the plaintiff and any person deriving title under her . . . . without any lawful interruption or disturbance by the Duke or any person . . . . rightfully claiming or to claim . . . . by, through, or under any one through whom the Duke derives title, otherwise than by purchase for value."

It is admitted by the Duke that, if the dedication of the footpath had been made by any person through whom he derives title otherwise than by purchase for value, the plaintiff would be entitled to recover against him the damages sustained by her by reason of his breach of that part of the covenant relating to his right to convey, and any further damage that may have been occasioned by reason of the breach of that part relating to quiet enjoyment. It is known that from the year 1782 down to the date of the sale to the plaintiff there was never a purchaser for value of the Peelings property. If therefore the dedication took place after 1782 the Duke is admittedly liable. Little, however, is known of the earlier title, and it may well be that one or more of the owners before the year 1782 acquired the property as a purchaser for value. If the dedication was made before

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the date of the last of such purchases, it is conceded by the plaintiff that her claim must fail. The question at issue between the parties is therefore one of fact. Was the dedication made since the year 1782 ? If not, was it made subsequent to the last preceding purchase for value ? It is obviously impossible in a case such as this, in which the only evidence of dedication is long continued user by the public, to ascertain the precise date at which the dedication was made. The plaintiff, however, contends that having regard to the evidence in the case I ought to arrive at the conclusion that the dedication was at any rate made after the year 1802. If, on the other hand, the evidence is insufficient to justify such a conclusion, the plaintiff contends that the onus is on the Duke of proving that the dedication was made before the last purchase for value, and that, if he fails, as admittedly he must fail, to discharge that onus, the plaintiff is entitled to succeed in her action.

It will be convenient to deal at once with this question of onus. In support of her contention that the onus lies upon the Duke, the plaintiff relies upon the case of *The Glendarroch*. (1) In that case an action was brought against some shipowners for non-delivery of goods which were being carried for the plaintiff by the defendants in a vessel of theirs on the terms of an ordinary bill of lading. The goods had been damaged through the stranding of the vessel, and the defendants claimed exemption from liability on the ground that the loss was occasioned by perils of the sea. Sir Francis Jeune, however, had ruled that in order to excuse themselves, it lay on the defendants to show not only a peril of the sea, but a peril of the sea not occasioned by their negligence. It was held by the Court of Appeal that as the loss fell within the exception of perils of the sea, the burden of showing that the defendants were not entitled to the benefit of that exception by reason of their negligence lay upon the plaintiffs. In giving judgment Lord Esher said this (2) : " We have to treat this case as if the contract were in the ordinary terms of a bill of lading. The contract being one on the ordinary

(1) [1894] P. 226. (2) [1894] P. 229.

terms of a bill of lading, the goods are shipped on the terms that the defendant undertakes to deliver them at the end of the voyage unless the loss of the goods during the voyage comes within one of the exceptions in the bill of lading. The exception relied upon by the defendants is that the goods were lost or damaged by a peril of the sea; and upon that, it is alleged that, even though that be true, yet that peril of the sea was the result of negligent navigation on the part of the defendants' servants. The law is that if that be made out the defendants have no defence, and the plaintiffs are entitled to succeed, and the real question is, how is that to be made out? By which of the parties is it to be made out?" He then stated that under a bill of lading and before you came to any exceptions, the liability of the shipowner is absolute —that his contract is to deliver the goods at the end of the voyage—but that then there follow certain exceptions. As to this Lord Esher said (1): "When you come to the exceptions, among others, there is that one, perils of the sea. There are no words which say 'perils of the sea not caused by the negligence of the captain or crew.' You have got to read those words in by a necessary inference. How can you read them in? They can only be read in, in my opinion, as an exception upon the exceptions. You must read in, 'Except the loss is by perils of the sea, unless or except that loss is the result of the negligence of the servants of the owner.' That being so, I think that according to the ordinary course of practice each party would have to prove the part of the matter which lies upon him. The plaintiffs would have to prove the contract and the non-delivery. If they leave that in doubt, of course they fail. The defendants' answer is: 'Yes; but the case was brought within the exception—within its ordinary meaning.' That lies upon them. Then the plaintiffs have a right to say there are exceptional circumstances, viz., that the damage was brought about by the negligence of the defendants' servants, and it seems to me that it is for the plaintiffs to make out that second exception. In my opinion, you find in all the books, down to the most

(1) [1894] P. 231.

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modern times, that the pleading followed that view of the burden of proof. The declaration stated the bill of lading, and, relying on the first and substantive part of the bill of lading, alleged non-delivery. Strictly speaking, the declaration could not properly have stated anything about negligence, because negligence was immaterial. The plea followed the terms of the exception construed in their ordinary sense —that is, that the loss was a loss by perils of the sea. No plea that can be found in the books ever went on to say that the loss by perils of the sea was not caused by negligence. Yet, if the contention be true that the burden of proof to that extent lies on the defendant, every one of those pleas without that allegation was no answer to the declaration, and was open to demurrer. There is no such case in which a demurrer was brought forward and supported. As that was so, it shows that it was no part of the proof which the defendant was bound to give. Then you have a long succession of cases, all setting out a replication, and that replication in the given case is : ' Yes, it is true there was a loss by perils of the sea within the primâ facie exception ; but that was brought about by the negligence of your servants—i.e., by your captain and crew.' The plaintiff could not depart from his declaration ; but he could support it by showing that the exception was not satisfied, because there had been negligence." It is clear from this judgment that the case is merely an authority in support of the general rule that in deciding the question whether the onus of proof of a particular fact lies upon one party rather than upon the other, the test is whether or not the allegation of that fact is essential to the first party's case. If it be essential in the sense that he would fail if it were struck out of his pleading, the onus is on him to prove it. If, for instance, in the case cited the exception from the general liability of the shipowner to deliver the goods had been confined to the case of " perils of the sea not caused by negligence " the decision would have been the other way. For the defendant would have had to plead the exception in the words of the bill of lading and could not plead an exception of perils of the sea in general,

which the bill of lading would not have contained. As it was, the plea of an exception of "perils of the sea" was not demurrable and afforded a good defence, unless the plaintiff alleged and proved the exception to that exception of perils occasioned by negligence.

In the present case the covenant by the Duke is not a covenant extending to the acts of all persons through whom he claims followed by a proviso or exception excluding from the operation of the covenant the acts of persons through whom he claims by purchase for value. If it had been, it would have been sufficient for the plaintiff to sue upon the covenant without referring to the proviso or exception, which would have had to be set up by the Duke in his defence if he wished to rely upon it. The onus would then have been upon him to prove that the dedication was the act of a person who was within the proviso or exception upon which he was relying. But, as it is, the covenant by the Duke does not in terms extend to all persons through whom he derives title, but only to a limited class of such persons; and in order to succeed in the action the plaintiff must allege and prove a breach of that covenant. It would not avail her to allege a breach of a covenant into which the Duke had never entered. The truth is that the words "otherwise than by purchase for value" are not an exception from the covenant. They form part of the covenant itself. I cannot hold that the onus is upon the Duke of proving that the dedication was made by some person through whom he claims "by purchase for value." The onus, in my opinion, is upon the plaintiff to prove that the dedication was made by some person through whom the Duke claims otherwise than by purchase for value. I must therefore consider the evidence adduced by the plaintiff.

Now the first fact relied upon by the plaintiff as showing that the dedication was made after the year 1782 is the fact that the evidence of public user, which proved the dedication, goes back no further than the year 1850 or thereabouts, and she contends that in these circumstances I ought to come to the conclusion that the act of dedication was in or about

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that year. In support of this contention she relies upon a passage in the judgment of the Privy Council in *Turner* v. *Walsh*. (1) In that case there was evidence of continuous user of a way over Crown lands from a date before the year 1861 right down to the year 1880. In the year 1861, however, a statute had been passed the effect of which was that any dedication by the Crown had to be in manner prescribed by the statute. It was therefore essential to the establishment of the public right of way to show that the dedication by the Crown was prior to the statute. It was held that from the evidence of continuous user a dedication prior to the statute might be presumed. Sir Montague Smith, in delivering the judgment of the Board, said this (2): "It is not correct to say that the early user establishes an inchoate right capable of being subsequently matured. If the right had been inchoate only in 1861, the argument of the appellant that it could not have been matured or acquired after 1861, except in the mode prescribed by the Act, would have had great force. The proper way of regarding these cases is to look at the whole of the evidence together, to see whether there has been such a continuous and connected user as is sufficient to raise the presumption of dedication; and the presumption, if it can be made, then is of a complete dedication, coeval with the early user. You refer the whole of the user to a lawful origin rather than to a series of trespasses." But I do not think that the expression "coeval with the early user" was intended to suggest that a dedication ought to be presumed to have been made at the date at which the earliest act of user took place. It was not necessary to ascertain in that case the precise date of the dedication, but merely whether the dedication took place before the year 1861, and I think that the Board merely intended to indicate that a dedication ought to be presumed to have been made at least as early as the first act of user.

As pointed out by Buckley J. in *Attorney-General* v. *Esher Linoleum Co.* (3) it is dedication and not user that constitutes

(1) 6 App. Cas. 636. (2) 6 App. Cas. 642.
(3) [1901] 2 Ch. 647.

a highway. User is merely the evidence that proves the dedication. Where the only user shown is user over a period less than that covered by living memory, there may be good ground for coming to the conclusion that the dedication took place only just before the time at which the user began. But where, as here, the user took place over the whole period covered by living memory, such user is just as good evidence of a dedication made a hundred years before the first proved act of user as of one made contemporaneously with that act. And this seems to be in accordance with numerous authorities of which only one need be mentioned. In *Winterbottom* v. *Lord Derby* (1), evidence was given of acts of user of a way extending over nearly seventy years; but during the whole period the land crossed by the way had been in lease. The jury were, however, directed that from long continued user going back as far as living memory could go they were at liberty to presume a dedication of a way to the public at a time anterior to the land being leased; and the Court of Exchequer held that this was a proper direction. If user during the whole period covered by living memory is necessarily to be treated as evidence of a dedication made at the date of the first act of user proved, it might lead to a strange result. If, for instance, in the present case the existence of the public right had been challenged, say, twenty years later than it in fact was, and therefore at a time when the oldest of the witnesses who gave evidence before me might have died, and when their evidence was no longer available, the Court that had to try the question might have to find that the dedication took place twenty years later than the date upon which the plaintiff now contends that it in fact took place—that is to say, the dedication would be held to have taken place after the way had been used by the public uninterruptedly for twenty years. I am not prepared to find that the dedication took place after 1782 merely because the evidence of user does not extend back beyond living memory.

The plaintiff, however, relies upon two maps as sufficient

(1) L. R. 2 Ex. 316.

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to establish her case. One is a map that comes from the possession of the Duke of Devonshire, and was produced at the trial. This map is intituled as follows. [His Lordship read the title of the map as above set out and continued :] The map indicates the existence and position of certain other footpaths, but it does not show any footpath through Peelings or the footpath from Peelings Lane to Friday Street described in my earlier judgment. It is admitted that Lord George Henry Cavendish was one of the Duke's predecessors in title, and the plaintiff accordingly relies upon the map as an admission made by a person privy in estate to the Duke that the footpath did not exist in 1802. Nothing, however, is known about P. Potter, and there is no evidence to show that he was employed by Lord George Cavendish to make the map, however probable it may be that this was so. But I need not pursue this matter further, because the other map produced by the plaintiff seems to me to be entitled to more weight. That map is the tithe map of 1840 produced from the proper custody. Like the map of 1802, it indicates the position of other footpaths, but shows no indication of the existence of the footpath over Peelings, or that from Peelings Lane to Friday Street.

The question as to the admissibility of a tithe map as evidence of the existence of a highway was dealt with by Farwell J. in *Attorney-General* v. *Antrobus*. (1) That learned judge said (1) : " The first objection is taken to a tithe map and award produced from the proper custody and acted upon, according to the witness's evidence, since 1863, and, doubtless, from the time it was made in 1847. It is tendered as evidence on the question whether there was or was not a public road across two fields which appear in that tithe map and award. In my opinion it is admissible on that question, and for this reason. In the first place, the document is a public document : it is prepared under the provisions contained in the Tithe Commutation Act of 1836. The Commissioners under that Act have power to examine witnesses on oath. An agreement may be come to and ratified by the

(1) [1905] 2 Ch. 188, 193.

Commissioners as to the amount of tithe rent-charge to be apportioned on various lands within the parish. Such parts of the land as are not tithable are matters which concern all the parish. It is certainly to the interest of any one who has land part of which is not tithable to put forward his claim and establish it if he can; and the question in this case is whether the particular piece of land over which a road is said to run is a road or not. If it was a road it would not be tithable, and if it is not a road then it would be tithable as part of the land; and as regards the owner of the field known as Pinkney's, it is obvious that it was material to him, if he could, to say that there was a road there in order to escape the tithe. It is therefore one of the matters material to the preparation of the award and the plan. It is also a matter of publicity, and I find Stuart V.-C. in a case of *Giffard* v. *Williams* (1), referring to a Tithe Commissioner's award and map, says: 'But the Act of Parliament requires these things to be done, not in a corner, but upon notice in all the most public places; so that it is impossible to treat this document otherwise than as a public one, and as public evidence that at that time the owner of the undivided moiety of this field was aware of the facts.' I do not refer to the actual decision. I must not be understood as deciding that, in my opinion, the tithe map would be evidence on any matter (although it is a public document) which is not within the scope and purview of the authority of the Commissioners who made it. I think they have to attend to their own business, and I guard myself against being supposed to say that I should hold that the tithe map was evidence of something it was not their business to ascertain." The fact therefore that the tithe map of 1840 does not show the footpath in question is, I think, some evidence that it did not exist at that date. For, if it did, the area that it occupied was not in strictness tithable, and such area should have been shown upon the map. It may of course be said that its area would have been so small that it would not have been practicable to exclude it from the tithable area, and that this is the explanation of

(1) (1869) 38 L. J. (Ch.) 597, 604.

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its omission. But, even so, it might reasonably be expected that the Commissioners would have shown it upon the map in a way that, while indicating its existence, would also indicate that its area was negligible for the purpose of computing the tithable area. For this is what they appear to have done in the case of the other footpaths already mentioned, which are indicated on the map by single dotted lines. There is not any evidence before me as to whether these other footpaths are highways. But if they are not, the absence of any indication of the public footpath now in question, if it existed at that time, seems all the more remarkable. The map is by no means conclusive evidence in favour of the plaintiff upon the question that I have to determine. But it seems to me to be some evidence, and evidence sufficient in the circumstances to shift the onus of proof from the plaintiff to the defendant. For, in such a case as the present, the plaintiff cannot be expected to have as great a knowledge of the acts of the defendant's predecessors in title as the defendant and his advisers and agents. I do not for a moment suggest that the defendant or his advisers or agents have in point of fact knowledge of any relevant circumstance not before the Court. But, as between the plaintiff and the defendant, the defendant must be presumed to have greater opportunities of knowledge as to the date of dedication than has the plaintiff. This being so, I think that I am justified in saying that the evidence afforded by the tithe map is sufficient to shift the burden of proof from the plaintiff to the defendant.

This subject of the shifting of the onus of proof is thus dealt with in vol. xiii. of Halsbury's Laws of England, section 608: "There are," the author says, "two cases in which the burden of adducing evidence is liable to be shifted from the party on whom it would naturally fall," one of them being the case "where the truth of a party's allegation lies peculiarly within the knowledge of his opponent." The passage then proceeds as follows: "The principle of this exception has frequently been recognised, both by the Legislature and in decided cases. On the other hand, its validity has been several

times challenged by high authorities, and having regard to this conflict of opinion, the following statement of the point is, perhaps, the one which is the least open to objection: 'in considering the amount of evidence necessary to shift the burden of proof, the court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively.'" These last words are an extract from Stephen's Digest of the Law of Evidence, 6th ed., art. 2.

In these circumstances the plaintiff is in my opinion entitled to recover from the Duke of Devonshire as damages the difference between the value of Peelings with and without the public right of way over it, such values being ascertained as at the date of the conveyance to her. She is also entitled to recover any further damages that she may have sustained since that date by reason of any interference with her quiet enjoyment occasioned by the exercise of such right. The amount of these damages will have to be ascertained by inquiry. The plaintiff is also entitled by way of damages to any costs which she may pay to the defendant council under my earlier judgment and also her own costs to be taxed as between solicitor and client of the issue between herself and the defendant council as to the existence of the right of way: see *Rolph* v. *Crouch* (1) and *Great Western Ry. Co.* v. *Fisher*. (2)

It was contended on behalf of the Duke of Devonshire that he is not liable for any greater damages than would have been occasioned to the plaintiff had an offer that was made at the Bar on behalf of the defendant council on July 24, 1925, been accepted by her. That offer was, in effect, an offer to compromise the question in issue as to the right of way on the terms that the plaintiff should admit the existence of a public footpath beginning at a point in the Hankham Road to the south west of the entrance to the plaintiff's drive, passing thence over the field numbered 269A on the plan upon the plaintiff's conveyance into the Six Acre Field at its north eastern corner, and thence over the accommodation

(1) L. R. 3 Ex. 44. (2) [1905] 1 Ch. 316.

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road to Peelings Lane. It was hoped that the plaintiff might see her way to accept this offer, inasmuch as no public footpath would then pass over the drive leading to the plaintiff's house. Now at the time that the offer was made, it was stated on behalf of the Duke that if no compromise was made, he would object to be saddled with the costs of the action. But the Duke in no way offered to recede from the position he had taken up on the pleadings, and made no admission of his liability to indemnify the plaintiff against the damage that she would incur if she accepted the defendant council's offer. Had he done so, there would be much to be said for the contention that I have mentioned. But as he did not, I cannot see that the plaintiff acted in any way unreasonably towards the Duke in refusing the offer. Had she accepted it and failed in her action against the Duke she would have had to submit to a public footpath crossing her land without getting any compensation from him. She was unquestionably justified as between herself and the Duke in endeavouring to defeat the claim to the footpath that was in issue in the action, and in my opinion she was equally justified in endeavouring to protect her property from the burden of the alternative footpath suggested to her by way of compromise.

C. A. The defendant Duke appealed. The appeal was heard on April 28 and 29, 1926.

Farwell K.C. and *Cecil Turner* for the appellant. We do not question the amount of damages, but we contest the question of liability.

The covenants implied on a conveyance by a beneficial owner are set out in s. 7, sub-s. 1 (A), of the Conveyancing Act, 1881, and the liability under the covenants is limited to acts going back to the last purchaser for value: *David* v. *Sabin*. (1) Romer J. held that the plaintiff's contention in the Court below that the words "other than purchaser for value" was an exception out of a wide general covenant and

(1) [1893] 1 Ch. 523.

that the onus was on the defendant was not a good contention, and we rely on that here. The plaintiff further contended that the Court ought to imply a dedication coeval with the earliest proved user of the right of way, but Romer J. did not accept that and we again rely on his decision, and on *Winterbottom* v. *Lord Derby* (1) and *Howard* v. *Maitland*. (2)

The plaintiff produced two maps in the Court below, the first, dated 1802, coming from the Duke's muniment room. There was no evidence to show how it came to be made, and the map did not show this particular footpath, and Romer J. disregarded it. The statement in the map itself is not sufficient to show that it was made by a competent person: *Assheton-Smith* v. *Owen*. (3)

The second map was the tithe map of 1840, which showed certain footpaths but not one where this particular path runs, and Romer J. came to the conclusion that the fact that it did not show this particular footpath did not prove that there was no footpath at that date, but that it was sufficient evidence to shift the onus of proof from the plaintiff to the defendant. We submit that the onus does not shift until the plaintiff has shown a prima facie case and that she failed to do so. If she made a prima facie case and the defendant has no answer to it, he must fail: per Bowen L.J. in *Abrath* v. *North Eastern Ry. Co.* (4)

The fact that neither of the maps shows this particular footpath is not sufficient prima facie evidence that there had not been a dedication to the public before the date of those maps, and if there is no prima facie evidence of the date of dedication then the plaintiff has not made out her case, because she has failed to show that the act was done by the Duke or by some one for whom he has made himself liable.

[LORD HANWORTH M.R. You need not trouble about the map of 1802; but what is the value of the tithe map?]

In *Attorney-General* v. *Antrobus* (5) Farwell J. admitted a tithe map in evidence on the question whether there was or

(1) L. R. 2 Ex. 316.
(2) 11 Q. B. D. 695.
(3) (1905) 75 L. J. (Ch.) 181.
(4) (1883) 11 Q. B. D. 440, 456.
(5) [1905] 2 Ch. 188.

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was not a public road across two fields which appeared in the map, but he did not intend to decide that the absence of a footpath on the map was evidence that there never was a footpath. The fact that the map does not show the path is not sufficient evidence that dedication took place after the date of the map. It is not sufficient prima facie evidence to enable the plaintiff to succeed in the absence of other evidence to the same effect. The absence of a footpath does not entitle, on the one hand, the defendant to say there was a way there, or on the other hand, the plaintiff to say that dedication could not have taken place before the date of the map: per Hamilton L.J. in *Attorney-General* v. *Horner*. (1) *Hammond* v. *Bradstreet* (2) did not decide anything with regard to the tithe map.

Sir Thomas Hughes K.C. and *R. A. Glen* for the respondent. Since 1782 there has been no purchaser for value in the Duke's title to this property. While reserving all the points taken on behalf of the plaintiff in the Court below, the question with which we now have to deal is—was there in these two maps sufficient evidence to go to the jury, and to support what in effect was the verdict and judgment of Romer J.? There was no evidence the other way, and that being so, was it fit and proper to have left the question to the jury? We submit that Romer J. was right in finding that the tithe map did afford some evidence, in the absence of any counter evidence, in support of his ultimate decision. Romer J. disregarded the map of 1802, but we desire to rely upon it.

The two maps are both hearsay evidence of reputation. Evidence of reputation is admissible on a question of highway or no highway. The tithe map comes within the category of public documents; not so the map of 1802, which is an admission by a man on behalf of the Duke. It need not be an admission against interest, as in the case of a deceased person, because here it is sought to be used as between two opponents.

The map of 1802 is over thirty years old and coming, as it does, from the proper custody, it proves itself and must be

(1) [1913] 2 Ch. 140, 155. (2) (1854) 10 Ex. 390.

presumed to be what it purports to be. Where a landowner has a plan prepared and keeps it as a plan of his estate it may be used against him as an admission. This map or plan appears to have been a map or plan made for Lord George Henry Cavendish, the owner at that time of Peelings, and we ask the Court to infer that P. Potter was employed by the owner to make the plan for him in 1802. The rule that an ancient document coming from the proper custody proves itself, extends to all kinds of documents besides deeds, and it has been held that it is not necessary to prove who the person was who made it: *Wynne* v. *Tyrwhitt* (1); *Davies* v. *Lowndes* (2); Taylor on Evidence, 11th ed., vol. i., § 87 and 88.

The map of 1802 stands on a stronger footing than the tithe map, because the latter was made for a limited purpose, while the former, if admissible, is not limited at all. It is a very carefully made map, and the fact that many ways are shown, but the ways in question are not shown, is evidence that the latter did not then exist, and there is no evidence that all the footpaths and bridleways are not shown. As between the parties to this action we submit that this map is admissible in evidence: *Doe* v. *Lakin* (3); *Rudd* v. *Wright.* (4)

[SARGANT L.J. referred to the ordnance survey map, which showed a great many more footpaths and ways than the tithe map of 1840, and said that if the latter map showed all the existing footpaths at that time, there must have been an orgy of dedication since 1840.]

The ordnance survey map shows every footpath and way, but that is no indication that the public have rights over them. One of the purposes of this map was to indicate footpaths and bridleways, and if they do not appear, the fair inference is that they did not exist. *Hammond* v. *Bradstreet* (5), where a witness produced a map which he had bought a few years before, illustrates the difference between

(1) (1821) 4 B. & Al. 376.
(2) (1843) 6 Man. & G. 471, 528.
(3) (1836) 7 Car. & P. 481.
(4) Phillips on Evidence, 272.
(5) 10 Ex. 390.

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a casual document and one which is prepared for one of the parties and comes from the proper custody.

The tithe map of 1840 is satisfactory evidence of matters therein recited or stated: Tithe Commutation Act, 1836, s. 64, and any fair and proper inference may be drawn from the map. Sir G. Jessel M.R.'s observations in *Wilberforce* v. *Hearfield* (1) do not extend beyond title to land and would not apply to the present case. A tithe map is a public document made by a public servant, and is evidence of reputation: *Sturla* v. *Freccia*. (2)

This is a question of public right, being a question of dedication, and evidence of reputation is admissible, although it may be an action between private individuals: *Smith* v. *Lister* (3), and a tithe map made under a public duty and under publicity is admissible: *Attorney-General* v. *Antrobus* (4), although it is put in evidence for a negative purpose: *Farquhar* v. *Newbury Rural Council*. (5)

In both these maps, which we submit are admissible in evidence, it is apparent that the surveyor in the earlier map, and the Commissioners in the later, intended that the whole of the footpaths should be shown. It was material in both maps to show the non-tithable area of the public ways and footpaths.

[PER CURIAM. Is there any authority for the statement that the area of footpaths was deducted from the area of tithable lands?]

None that we have been able to find beyond the statement of Farwell J. in *Attorney-General* v. *Antrobus*. (4)

Both these maps show that neither in 1802 nor in 1840 was there any such right of way as is now in question, and that shifts the onus on to the appellant: *The Glendarroch*. (6) He has not discharged that onus, and therefore the dedication must be taken to have been after the later date. The result of this is that the Duke is liable under his covenant.

(1) (1877) 5 Ch. D. 709.
(2) (1880) 5 App. Cas. 623, 643.
(3) (1895) 72 L. T. 20.
(4) [1905] 2 Ch. 188.
(5) [1908] 2 Ch. 586.
(6) [1894] P. 226.

There is another piece of evidence in our favour, for in 1845 a railway was cut through the public way leading from Beggars Lane, and provision was made by the railway company for that public way, but no provision was made for the way in question, presumably because it did not then exist.

[SARGANT L.J. The tithe map of 1840 does not show that public way which was intersected by the railway, any more than it shows the way in question. Neither was material to the purpose for which the map was made.]

LORD HANWORTH M.R. stated the facts above set out and continued: The first part of this action was tried before Romer J. in July of last year, and on October 22 following he gave his judgment upon the first issue whether or not there was a right of way. It is important to take note of what he found in his very careful judgment. The evidence that had been given was of acts of user running back for a full period of seventy years, if not more. Romer J., carefully going through the facts and applying the law, says this: "But whatever may have been the public use of the way in question I ought not to infer from that use a dedication of the way to the public if it can reasonably be explained upon other grounds. I think that the plaintiff's counsel were right when they said that the presumption of dedication is only to be resorted to in order to explain something that is not otherwise capable of a reasonable explanation." That was the way in which the matter was put before him, because it is necessary if a public highway is to be found that there must be some dedication to the public proved or inferred by which alone the public gains its rights. Then he proceeds to consider a number of points on which the plaintiff alleged that there was no highway. In dealing with them Romer J. referred to the summing up and direction to the jury in *Davies* v. *Stephens* (1) by Lord Denman C.J., who said this: "All the acts of user seem to have taken place during the occupation of tenants, and their submitting to them cannot bind the owner of the land without proof of

(1) (1836) 7 Car. & P. 570, 571.

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his also being aware of it; but still, if you think that such acts of user went on for a great length of time, you may presume that the owner had been made aware of them." After dealing with that Romer J. then says what he thinks he ought to infer, and he does infer: "That the user by the public of the way over Peelings, which is the subject-matter of this action, was referable, not to the mere tolerance of the occupiers of Peelings, but to a dedication of the way to the public at some time or another by the then owner of the premises." He therefore gave judgment against the plaintiff, and affirmed by that judgment that there was this right of way. There is no appeal from that portion of his judgment, and therefore it has been declared that there is this right of way which I have indicated and which passes over certain land of Peelings.

Then the action was continued before him as against the Duke of Devonshire. Romer J. heard the evidence and arguments at a trial which took place before him in November last, and on December 17 he gave judgment against the Duke. He held that he was liable for breach of the covenant for title implied by s. 7, sub-s. 1 (A), of the Conveyancing Act, 1881. It is important to observe that for a certain number of years—perhaps ever since the Conveyancing Act was in force—it has been held that that covenant which is so implied is a limited covenant. It is not an all-embracing covenant from which there are exceptions, but it is a qualified covenant. That has been definitely decided in this Court in *David* v. *Sabin* (1), where Lindley L.J. quotes the words of the implied covenant and says: "These words render a vendor's covenant a qualified covenant, and not an absolute warranty of title, as is the covenant by a mortgagor who conveys as beneficial owner (see clause C of the same section). The statute has, in this respect, followed the long-established and well-known practice of conveyancers, as may be seen from" the authorities to which he refers. "But, although a vendor's covenant for title is not an absolute warranty of title, it is very wide. The acts and omissions

(1) [1893] 1 Ch. 523, 531.

covenanted against are reducible to four heads—viz.: (1.) the acts and omissions of the vendor himself; (2.) the acts and omissions of persons through whom he claims otherwise than by purchase for value; (3.) the acts and omissions of persons claiming through him; (4.) the acts and omissions of persons claiming in trust for him."

It will be observed, therefore, that discarding the categories which are inapplicable in the present case, if the plaintiff is to succeed for breach of this implied covenant, the acts which must be proved as against the defendant must be either the acts and omissions of the vendor himself or the acts and omissions of persons through whom he claims otherwise than by purchase for value. Romer J., applying his mind to this question, dealt succinctly with the points which have been fully argued before us. It appears that the Dukes of Devonshire have not been resident at Eastbourne, but knowledge as against them may be implied. "It is known," says Romer J., "that from the year 1782 down to the date of the sale to the plaintiff there was never a purchaser for value of the Peelings property. If, therefore, the dedication took place after 1782 the Duke is admittedly liable." That position is not contested by his counsel before us. Romer J. goes on: "Little, however, is known of the earlier title, and it may well be that one or more of the owners before the year 1782 acquired the property as a purchaser for value. If the dedication was made before the date of the last of such purchases, it is conceded by the plaintiff that her claim must fail." Pausing there for a moment, we have the conveyance to the plaintiff containing the implied qualified covenant, and it is plain from what Lindley L.J. said, which was rightly interpreted by Romer J., that for all that has happened after 1782, when the Duke's predecessors in title could have granted a dedication, the Duke would be liable, but, inasmuch as there were purchases for value anterior to that date, if the dedication took place before that date the dedication may have been made by some person for whom the present Duke is not liable, because, taking the second category of Lindley L.J., it must be shown

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that they are "the acts and omissions of persons through whom he claims otherwise than by purchase for value." It therefore is necessary for the plaintiff, in order to establish liability against the Duke upon this covenant, to establish affirmatively that there was a dedication of this right of way at some time subsequent to 1782, from which time the Duke is liable. That issue is really a narrow one. The evidence that was adduced as affirming it can be really restricted to two maps.

Before dealing with the maps, I ought to say that I agree with Romer J.'s opinion that when you find the proof of the user of a right of way going back a great number of years, you are not to presume that the dedication took place at or about the time of the earliest user that is proved, because the user may be treated as evidence of a dedication at an earlier date. There is abundant authority which he cites for that proposition, and he rightly calls attention to the fact that if there were no such right to presume a dedication at an earlier date, and if the first act of user were to be deemed to be the date of the dedication, strange results might follow.

For the purpose of proving that there was not any dedication before 1782, the first document that is referred to is a map produced from the Duke's muniment room and made in 1802. It is intituled "Plan of the Parish of Westham in the County of Sussex, the Great Tythe of which is the property of the Right Honourable Lord George Henry Cavendish describing more particularly his Lordship's own estates in the said Parish and also those in the adjoining parishes of Willingdon, Folkington, Hailsham, Pevensey, Wartling and Bexhill." It bears on its face a statement that it was surveyed by Mr. P. Potter in 1802. It has a part of the Cavendish crest upon it. It is said that this map is admissible. I find some difficulty in acceding to that contention, because there is no evidence who Mr. Potter was, and although documents over thirty years old, coming from the proper custody, prove themselves, that does not prevent the necessity of giving some evidence to connect the person

who is apparently the maker of the map or the document in some way with the estate to which this map or document is said to be relevant. There is no evidence how Mr. Potter came to make the map, except that it is said to be a plan of the parish the great tithe of which is the property of the defendant's predecessor in title.

But let us assume that the map is admitted as evidence, what does it show? It is a map made with precision, and with a good deal of care. The dykes and hedges dividing the fields are indicated; in a number of cases there are gates and gateways shown; there are some fencing and bridleways and pathways shown upon it. There is no evidence to show that the map was made for the purpose of including and demonstrating all the bridleways and pathways, or public rights of way upon it. But it is said that, admitting the map as evidence, inasmuch as you do not find this particular public footway in question marked upon it, you may deduce from that that it did not exist at the time, and therefore the map proves that in the year 1802 there had not been a dedication of this footway to the public. If that be so, it is said that you have brought the responsibility home to the Duke, because the dedication must have taken place after 1802, and during the period in which the Duke is responsible for his predecessors. But accepting that this map shall be evidence of something, I am unable to make such a deduction from it. As Romer J. has said, the plaintiff must give affirmative evidence to discharge the onus that is upon her. Can one deduce from this map affirmative evidence that the footway was not in existence in 1802? I find it quite impossible to draw any such deduction. The map appears to have been made alio intuitu and not for the purpose of delineating public or private rights. It is merely an informatory map for the purpose of describing more particularly his Lordship's own estates in the said parish and those in the adjoining parishes; in other words it shows what are the estates of Lord George Henry Cavendish on which he would not pay himself tithe, but also the property not belonging to himself, and from which tithe did issue to him. Taking

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that map at its high water mark, it appears to me that it cannot be held to discharge the onus which lies upon the plaintiff.

The next map which we are asked to take into our consideration is the tithe map of 1840. This tithe map was made under the statute of 1836, which required the Commissioners to ascertain what was the tithe payable by the parish and to apportion it amongst the various items of land in the parish, and the aliquot portion of the tithe was said to issue out of the particular fields which were appropriated to the payment of that quota. Sect. 64 provides that there shall be a map kept in proper custody, and then it enacts in the closing words of the section : " and every recital or statement in or map or plan annexed to such confirmed apportionment or agreement for giving land, or any sealed copy thereof, shall be deemed satisfactory evidence of the matters therein recited or stated, or of the accuracy of such plan." I must deal with that section at a little greater length, but lest it should be thought that I had overlooked it, I desire to say that I have some difficulty in seeing whether this map could be used for any purpose at all, inasmuch as the question between the present plaintiff and the Duke is a question of private right and not one of public ownership. There is no issue now as to the existence in fact of a right of way. That is now proved and not disputed. There is no question that that right of way is founded upon a dedication to the public. That also has been found, and the finding is not disputed.

The sole question before the Court is whether it is proved that the dedication was made before 1782 or later. It may, therefore, well be argued that this is a case of a private right such as to exclude evidence of reputation; see the observations of Parke B. in *Lord Dunraven* v. *Llewellyn* (1), and see also *Doe* v. *Thomas*. (2) It is, however, unnecessary to my mind to deal with the matter before us upon that debateable ground.

The tithe map does not contain any delineation of the footway in question, and indeed the tithe map in many

(1) (1850) 15 Q. B. 791. (2) (1811) 14 East, 323.

features follows the map of Mr. Potter of 1802. It is remarkable that the orientation of the points of the compass appears to be much the same in both. It is said that the map can be looked at on this matter, which is one of public right, and that inasmuch as there is no indication of this footway upon it, although there are indications of some footways and bridleways, as there were in the map of 1802, therefore the dedication must have taken place at a date subsequent to 1840, the date of the map, and consequently in a period for which the Duke is responsible.

It is important to see how that map came into being. It is annexed to the General Award, which sets out various matters, the articles of agreement with the parish and the vicar, and a number of matters which it was necessary for them to show, indicating a merger of the tithes theretofore existing, all of which matters are recited. It then sets out in particular the closes and fields with the measurement and the apportionment of the tithe to them. By s. 64 of the Tithe Commutation Act, 1836, it is provided: "Every recital or statement in or map or plan annexed to such confirmed apportionment or agreement for giving land, or any sealed copy thereof, shall be deemed satisfactory evidence of the matters therein recited or stated, or of the accuracy of such plan." It is plain that the Commissioners who were making the award would not have to determine what were the particular rights of footway over the closes which are indicated in the schedule. It does not appear that they were intended to determine public rights of way, and the map itself is to be evidence of the matters therein recited or stated. Here it is put forward only as a chain in an argument based on the doctrine of "inclusio unius est exclusio alterius," and to indicate that because the footway is not marked, it cannot have been in existence. A comparison with other maps will show that there are in fact a great number of other footways which are not contained in it, and it would be making use of the map for purposes for which it was not intended to be used, if in fact it were admitted, and the reasoning were accepted which is based

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upon the omission of the footway from it. In *Wilberforce* v. *Hearfield* (1), to which reference has often been made, a tithe commutation map was tendered as showing the boundary of land in the case of a disputed title, and Sir George Jessel in a judgment which is very brief but to which, so far as I have found it mentioned in other cases, exception has not been taken, said this: "I must reject this evidence. The tithe commutation maps were never intended by the Legislature to be evidence as between two parties of the title to land. I cannot conceive the meaning of s. 64 to be that these maps were to be satisfactory, that is conclusive, evidence on questions of ownership." It appears to me that that sentence, short as it is, cannot be disregarded, and that its weight must have an effect upon our judgment.

In *Hammond* v. *Bradstreet* (2) criticism was made in the Court of Queen's Bench upon maps which were produced and relied upon in the Court below. Coleridge J. said of the particular map, on the assumption that it had been accepted as evidence: "How would these documents be evidence that the place in question was in the county of Norfolk, the evidence would merely show that the place was not in Southtown, in the county of Suffolk."

The deduction which is sought to be made from this tithe map, even if it is admissible between the parties, is one which cannot rightly be accepted. Is it fair or right that the Courts of Justice, who, according to the simple rule, require the best evidence of a fact, should accept a map, made for a different purpose, which is satisfactory as evidence of the matters therein recited, to be used as a chain in the argument that, because some public right is not inserted in it which might possibly have been inserted in it, therefore that right was non-existent at the time? That is going altogether too far, and misreading the purpose for which the tithe map can be used.

Attorney-General v. *Antrobus* (3) was relied upon, but it appears to me that the tithe map which was placed before

(1) 5 Ch. D. 709, 710. (2) 10 Ex. 390, 395.
(3) [1905] 2 Ch. 188.

Farwell J. in that case was used rather as confirming his opinion in the sense that it did not afford any sort of contradiction to the view that he accepted, than as indicating that it would be fair to say that he had accepted the tithe map for all purposes in the issue upon which it was put before him.

Those are the two pieces of evidence which have been relied upon by the plaintiff as discharging the onus which lies upon her of showing that the dedication must have taken place at a date subsequent to 1782. Taking them as admissible and as admitted, they do not afford sufficient prima facie evidence to discharge the onus which lies upon the plaintiff. It is not sufficient to give some tittle of evidence and then say that that throws the onus on to the other side. I think that what was said by Lord Esher in *Medawar* v. *Grand Hotel Co.* (1) is right. That case ultimately turned upon a very nice consideration of the onus which lay on one side and then on the other, and shifted backwards and forwards. Lord Esher said: "The defendants have not discharged the onus that lay upon them, because they have not proved that the loss was occasioned by the negligence of the plaintiff." We have been invited by both counsel appearing for the respondent to say that the onus had been discharged in the sense that it was only an onus, and that less weight of evidence was required to discharge an onus than to prove a case. It appears to me that that is a false user of terms. Romer J. held that there was sufficient evidence to shift the onus of proof from the plaintiff to the defendant. It appears to me that there can only be sufficient evidence to shift the onus from one side to the other if the evidence is sufficient prima facie to establish the case of the party on whom the onus lies. It is not merely a question of weighing feathers on one side or the other, and of saying that if there were two feathers on one side and one on the other that would be sufficient to shift the onus. What is meant is, that in the first instance the party on whom the onus lies must prove his case sufficiently to justify a judgment in his favour if there is no other evidence given. Having

(1) [1891] 2 Q. B. 11, 22.

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regard to the two maps, and admitting them quantum valeant, in my opinion there has not been sufficient evidence to prove that there was a dedication later than 1782. That dedication may quite easily, and quite well, have taken place before that date and been made by some person for whom the Duke is not responsible. The learned judge was satisfied that there was a shifting of the onus, but only upon the shifting of the onus did he find for the plaintiff. If the onus had not been discharged he would have given judgment for the defendant. There were a number of points before him which he decided in favour of the defendant, but on this question of onus he decided in favour of the plaintiff. In my view a right appreciation of the evidence that has been given by the plaintiff is that there is no sufficient prima facie proof that there was a dedication subsequent to 1782, and therefore the plaintiff has not established her case. There is no deduction which can be made from those maps which affirmatively proves what it is essential for the plaintiff to prove.

For these reasons I think that the appeal must be allowed with costs here and below.

WARRINGTON L.J. I am of the same opinion. Two issues were raised in the present action. The first was raised between the plaintiff and the Rural District Council as to the existence, or non-existence, of a public right of footway through a certain portion of the land purchased by the plaintiff from the Duke of Devonshire. That issue was established in favour of the Rural District Council, but the judge was careful to say that although he found that the council had established the existence of the public right of way, and, therefore, the dedication of that right by the owner of the land, he did not know, and there were no materials before him to inform him when, or by whom, that dedication was made. The second issue in the same action—really it was a second action—was an issue between the plaintiff and the Duke of Devonshire as the vendor to her of the land over which the public right of way had been established.

Her alleged ground of action against the Duke was for breach of covenants of title, which are by statute to be deemed to be included in her conveyance, the vendor having conveyed as beneficial owner. Those covenants are covenants which protect the purchaser against acts done by the vendor, or by some person—I am stating it very shortly, and only so far as material to this case—through whom the vendor derives title otherwise than by purchase. It has been established by a decision of this Court that, upon the true construction of that covenant, the persons whose acts may give rise to a breach of the covenant are a limited class of persons defined by the statute, a class which does not include persons through whom the vendor derives title by purchase for value, and that the covenant is not to be construed as imposing a general liability upon the covenantor for the acts of all of those through whom he derives title, except purchasers for value; that is established. The argument to the contrary—namely, the argument that the onus is thrown upon the vendor to establish that the act was done by a person through whom he derives title by purchase for value, is not the true view of the construction of the covenant. The decision of Romer J. upon that point is certainly correct. That being the construction of the statute, in order to succeed the plaintiff must establish affirmatively, to the satisfaction of the Court, that the act complained of as occasioning the damage was done by one from whom the vendor derives title otherwise than by purchase for value.

In the present case the plaintiff can only do that by establishing that the dedication took place subsequently to the year 1782. Why that is so it is unnecessary to explain. It is sufficient to say that if the dedication took place before that date it might have been by a person through whom the vendor claims by a purchase for value. Accordingly, the question on this appeal is whether the plaintiff has established, to the satisfaction of the Court, that the dedication took place subsequently to the year 1782. The learned judge has held that she has done so, and the question, I think, which we have to determine is whether the judge

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had before him evidence upon which, in the absence of contradiction, he could properly come to the conclusion that the footway was dedicated subsequently to the year 1782. The learned judge has treated the case as one in which the question was whether an onus has been shifted so as to throw that onus on to the person upon whom it was not at first cast. I do not think it makes much practical difference, but, technically, with all respect, I do not think that that is the right way to look at it. The affirmative was, and it remained, on the plaintiff, and the question is whether the evidence adduced by the plaintiff, remaining uncontradicted, was such evidence, and of such weight, that the judge could properly, with that evidence, and no more, come to the conclusion at which he arrived.

Having stated that as a question which we have to determine, the next matter to be mentioned is what was the evidence that was before the learned judge? In the first place, he had evidence that there had been, at some time or another, the dedication of a public footway. It appears from his judgment on the previous issue that even in these modern times, the footway was used mainly by residents in the neighbourhood, although it was also used at times by strangers. I should take it that in ancient times the user was very much less than it is at the present time, especially in the neighbourhood of places like Eastbourne and Pevensey, frequented in the summer by a large number of visitors.

The only positive evidence, if it can be called positive evidence, which was adduced by the plaintiff on this particular issue, consisted of two maps, and the point upon both these maps was that there was no indication upon them, by dotted lines or otherwise, of the existence of a footway such as that which has been established in the present case. It is important, in order to determine what is the weight of the evidence to be derived from those maps, to consider for what purpose they were made.

The first of those maps, which is dated in 1802, was produced from the muniment room of the Duke of Devonshire. It purports to have been made in the year 1802, and to have

been made by a man named Potter. Who Potter was, nobody knows, but it was produced from the muniment room of the Duke, and I should infer that it probably came into existence as part of the documents material for the owner of the estate to possess. In all probability I think we should not go very far wrong if we took it that it was prepared under the instructions, or for the purposes of, the then owner of the property, or his agents; that may be, and the learned judge has used it on that footing, that is to say, he has used it as containing a statement by, or authorized by, a person privy in title to the Duke. So far as that is concerned, I am quite willing to assume, without deciding it, that the map was properly admitted in evidence, and admitted in evidence on that ground. The question is: What is its weight? I prefer, really, to deal with that question when I come to the exactly similar question with regard to the tithe map. Before I part with this map of 1802 I wish to say this much about it, that it is entitled. [His Lordship read the title of the map above set out and continued:] I think it is quite obvious that the main purpose of that map was to show over what lands Lord George Henry Cavendish had the great tithe, distinguishing the lands in the parishes which were in the ownership of Lord George Henry Cavendish, because over those lands, he, being the owner of the lands, as well as the tithe owner, would not actually receive the payment of the tithe. The point of that is that, in my opinion, it was the question of liability to tithes which was the main object in the preparation of the map, and there is, therefore, no reason to suppose that the surveyor who was making this map would put upon it indications of physical conditions which would have no bearing on any question connected with the tithe.

The second map which was relied upon was the tithe map of 1840. I need not, of course, say anything about what a tithe map is, because we all know. I will assume, again, that in this issue between the plaintiff and the Duke, as in the issue between the plaintiff and the Rural District Council, the tithe map was properly admissible, but again, and even

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for more forcible reasons than those which I have alleged in the case of the map of 1802, the persons who prepared this tithe map were concerned, and concerned only, with questions which affected the condition material to the consideration of tithe, and its amount, as regards the land which was included in their survey. It was of no consequence to them, for example, whether a particular field was approached by a gateway, or whether it was surrounded by hedges, or fences, or trees, or whatever it might be. They were not concerned with that at all, and I think I shall show that neither Potter nor the Tithe Commissioners were concerned in such a matter as that which is now in issue.

The public way in question is a mere footway. There is no evidence that the land over which it passes remained otherwise than in its natural condition until, in recent times, an occupation road was made over it by the then occupier of Peelings farmhouse. It was of such a nature that the mere passing of foot passengers over it would not, in the ordinary course, bring about the existence of some defined feature (such as, for example, a gravelled or a metalled footway) which one would expect to be inserted in a map not required for the indication of that particular kind of feature. It is entirely different from such a case as that which was before Farwell J. with regard to Stonehenge, where all the roads in question were carriage roads occupying, each of them, a substantial part of the land over which they passed, and therefore material in reference to a question of tithe. The mere existence of a right of foot passengers to walk across a field seems to me not to be in the least material to any of those questions, and therefore not one which we would expect to find specified on a map made under the circumstances and for the purposes for which these two maps were made. It is on that ground that in my judgment neither of these maps, by the omission of the mention of this particular way, affords any evidence whatever that the right to enjoy that way was not in existence at the date that those maps were respectively made. If there is no sufficient evidence that the right was not in existence at the date of

the earlier of those maps, there is no evidence that it was not in existence previously to, or that it came into existence subsequently to, 1782.

There is only one other matter to which I may refer with regard to those maps. They do show a certain number of footpaths, but a comparatively small number. I think that where they are shown, and where there is any statement made with regard to them, they are footways distinctly leading from one village to another village ; they are footways of some importance. On the other hand, there are a very much larger number of footpaths marked on the Ordnance Survey than those shown upon these earlier maps, and it seems to me inconceivable that all those other footpaths, many of which, from their position, may reasonably be inferred to be public, can have been all of them dedicated since those other maps were made. However, those observations are by the way.

The real ground of my judgment is that these maps, prepared under the circumstances in which they are taken to have been prepared, and for those purposes, are not sufficient evidence, by the mere omission of the record of a physical feature indicating the existence of a right of footway such as this is, to enable the Court to come to the conclusion that those rights did not exist at the time those maps were made.

With regard to the point taken before Romer J. that dedication ought to be inferred at, or about, the date of the earliest proved user of the public road, I entirely agree with the learned judge, for the reasons given by him, and I have nothing more to say about it.

The result is that, in my opinion, the learned judge came to the wrong conclusion ; the appeal ought to be allowed and judgment ought to be entered for the Duke on this part of the action, with costs here and below.

SARGANT L.J. I am of the same opinion, and I will endeavour to compress my reasons into as small a compass as possible.

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The first point the learned judge had to decide was on whom the onus lay. With regard to that, it seems to me that his decision was perfectly right. The covenant, which is the statutory covenant, implied by reason of the vendor being expressed to convey as beneficial owner is, to my mind, obviously a covenant for himself, and for a limited class of persons, and those persons only. That is shown quite clearly by the decision in *David* v. *Sabin* (1), and especially in the judgment of Lindley L.J., and I think it is fairly obvious from the terms of the statute. That being so, the plaintiff can only succeed if she can show that the dedication of the right of way was made subsequently to the year 1782, since it is only back to that date that it is known that the predecessors of the Duke were of the limited class in question. Previously to 1782 the predecessors may have been either of that class, or of a class of persons who sold for money, or for money's worth. In that state of things, it is necessary for the plaintiff to establish that the dedication took place subsequently to the last purchase for value before the year 1782.

I also agree with the learned judge in what seems to me to be quite an obvious conclusion, that you must not presume that a right of way first originated at the date at which it is first shown to have been exercised. The result of such a view would be really chaos, because it would depend merely upon the age of the oldest inhabitant who could testify on the subject. The fact that you can bring evidence of the use of a right of way back to only a certain date seems to me to have no relevance at all to the question of the prior date at which that right of way was created.

Then there comes the third and most important point, whether the evidence of the existence of the right of way was sufficient to prove dedication since the year 1782. Here I have the misfortune to differ from the learned judge. He has spoken of the question as being one of displacing an onus. I think that that is true, in a certain sense, but I think it means, and I think the learned judge intended it

(1) [1893] 1 Ch. 523.

to mean, this: Was there evidence which by itself was sufficient to prove the fact, in default of there being any evidence to the contrary given by the other side? The mere fact that no evidence is given by the other side is of no assistance in determining the question whether the evidence given by the plaintiff is sufficient to prove the fact which she has to prove, except, perhaps, where the defendant has, or may be presumed to have, evidence in his possession, and he does not bring forward that evidence. The fact that the defendant neglects to bring forward evidence which is in his possession, and which would have enabled him to displace the other evidence, may be, in itself, sufficient, when added to the positive evidence given by the plaintiff, to make that evidence, which would not otherwise have been sufficient, sufficient for the purpose in question. I think that in the present case the learned judge really went upon that view of the case. As I read the judgment, he would not, on the evidence of the two maps themselves, which was the only evidence before him, have come to the conclusion to which he did come. He came to that conclusion for this reason, I think. He says: "But as between the plaintiff and the defendant, the defendant must be presumed to have greater opportunities of knowledge as to the date of dedication than has the plaintiff." Then he refers to a passage from Halsbury's Laws of England on the subject, and there is a similar passage in the well known work of the late Stephen J. If that had been the case, that there was evidence in the possession of the defendant greater than that in the possession of the plaintiff, and that the defendant had refrained from producing the evidence, I think that that conclusion of the learned judge might have been justified. I cannot myself see any sufficient reason for coming to that view, because, after all, this is not a case in which any living person can have any knowledge whatever upon the subject. The whole of the knowledge upon the subject is derived from the documents that exist with regard to the matter, and when once the defendant makes a full and clear affidavit of the documents in his possession, and thus puts all the

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material in his possession at the service of the plaintiff, and she has availed herself of that opportunity, the parties, for this purpose, seem to me really to be on precisely the same footing, and no inference can properly be drawn against the defendant to aid the inference that might otherwise be drawn from the statements in the documents.

That being so, are the two maps of 1802 and 1840 sufficient to prove that this right of way did not exist at the time of the making of either of those documents? In my judgment they are not. I will assume that the document of 1802 is a document which, coming from the custody from which it does come, may be treated as evidence as being a statement of a predecessor in title of the defendant. I will assume that. I feel some doubt, because of the absence of proof of the qualification of the person who made the document. The mere beauty of the document itself can hardly, I think, be sufficient evidence of the ability or the status of the person who made the document, but I will assume that that document was admissible. I will assume also that the tithe commutation map was also admissible. With regard to that, I, with some hesitation, want to say this, that I do not feel myself, as at present advised, able to concur with the view that was expressed by my Lord that the tithe commutation map was not admissible as a statement with regard to public rights in an issue between two private persons. Looking at the reasons given in Taylor on Evidence, paras. 608 and 609, for the admissibility of hearsay evidence with regard to public rights, it appears to me that this is founded upon the nature of those rights, and the reliability of evidence with regard to them, evidence in the knowledge of various members of the public. I feel some doubt whether that admissibility is to be limited to an action in which public rights are themselves involved. It appears to me that they would be, or might be, admissible in actions between private individuals if the rights of those private individuals are derived from, or are dependent upon, the existence of public rights at a previous time. It certainly would be a very lamentable thing if the result of such doctrine were that

in this particular action you might, in the issue between the Rural District Council and the plaintiff, have some evidence that was admissible which was not admissible as between the plaintiff and the Duke. However, without deciding that point, and only indicating some doubt as to the view expressed by the Master of the Rolls, I want to consider what is the weight of the evidence in question.

As regards the map of 1802, I need add nothing to what has been already said. With regard to the map of 1840, the whole of the argument for the respondent appears to rest upon this, that the titheability of the various closes over which a public footpath runs would be affected by the existence of that public footway. That was based upon certain remarks made by Farwell J. in *Attorney-General* v. *Antrobus* (1), which remarks dealt with definite roads. It seems to me that the two things are entirely different. I can quite understand that in the case of definite roads, where the cultivation of the soil is prevented, those roads would not be titheable; but to say that an ordinary pasture or arable field, over which a right of public footpath exists, has its titheability confined to the other parts of the field, not including the small strip of land covered by the footpath, seems to me quite contrary to common sense and to the documents which we have before us, because I see that in the assessment in this case the fields assessable are apparently estimated as being of their ordinary acreage. So far as I can see, no deduction is made from any field where a public right of way is shown in respect of the area of the strip of path in question. There is an ultimate deduction which seems to me to be of considerable importance at the end of the schedule in respect of roads, droves, and wastes. There is no deduction made at all in respect of footpaths. Such a deduction seems to me, as regards titheability, to be really hardly reasonable.

In my judgment the persons who were preparing this tithe map had no reason at all for directing their attention to the question whether there was a footpath across any one of these fields, and if there was a footpath—because this has further

(1) [1905] 2 Ch. 188.

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to be considered—whether that footpath was a public footpath, or was a private footpath. Further, when the map itself is looked at, and when it is compared with the ordnance map, which we have before us, it seems to me to be quite clear that the paths that were indicated on the map of 1840, as well as on the map of 1802, were quite a small proportion of the paths that were existing at the time. Unless we are to suppose that there was some outbreak of dedication between the year 1840 and the time when the ordnance map was constructed, I cannot account for the extraordinary difference between the number of paths shown on the ordnance map and the paths shown on the maps of 1840 and 1802. I think Mr. Glen really drove the case home against himself when he referred to that footpath which leads from Beggars Lane across the railway up to Rattle Land, because he told us that it was shown in the evidence that the railway line had been constructed in the year 1845, and it is clear that when the railway line was constructed there was a public footpath, or, at any rate a footpath which I think must have been a public one, because it runs between two highways, and not from one tenement to another. There was a footpath existing in 1845, for which provision was made by the railway company by having a number of steps down below the level of the rails, and then a number of steps up on the other side. That footpath, which was existing in 1845, is also not shown upon the tithe map of 1840. It is, as a matter of fact, what is said to be, or what has been found to be, the continuation of the footpath, the right to which has been enforced in the present action. That is only one instance, but I think it is an instance of a numerous class of footpaths which, although existing at the date when the tithe map was made, were not indicated on that tithe map, because they were of no importance for the purpose in question—namely, the apportionment of the tithe amongst the different hereditaments in the parish.

It was put to us, in some way or other, that we were to consider what a jury would have found, or what direction ought to have been given to a jury, or, if the jury found one way, what we ought to have done then, but I do not think

that we have to consider any question of that kind. The question here is simply whether the inferences from these two documents, taken together, sufficiently prove that there was not a public footpath in existence in the year 1782, and on that ground we are in quite as capable a position as the learned judge below. It is not a question that depends at all upon the credibility of witnesses, or anything of that sort, and we have to judge for ourselves whether these two maps do afford a sufficient proof that the footpath originated subsequently to the year 1782. I suppose that in the vast majority of cases, the footpaths which exist throughout the country in the rural districts are footpaths that have existed for hundreds of years. But, quite apart from that consideration, and having regard to the circumstances in which these two maps were prepared, the object for which they were prepared, and having regard also to the fact that this is purely negative evidence in the sense that the footpaths merely do not appear there, and having regard also to the fact that it has not been shown in any way by the plaintiff that the vast majority of footpaths existing in 1840, or in 1802, were indicated upon the maps in question, it seems to me that the mere negative fact that this particular footpath does not appear on either of those maps is not sufficient to enable us properly to draw the inference that there was no such public footpath existing at the date of either of the maps.

I agree, therefore, that the appeal should be allowed.

Solicitors for the plaintiff: *Dowsons & Sankey.*
Solicitors for the Duke of Devonshire: *Currey & Co.*

R. M.

ASTBURY and CLAUSON JJ.

1926

Nov. 8.

In re A DEBTOR.

[82 of 1926.]

Bankruptcy—Company—Winding Up—Mutual Dealing—Set-off—Fraudulent Preference—Repayment by Liquidator of Judgment Debt—Order on Judgment Creditor to repay—Right of Judgment Creditor only to Proof in Winding Up—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 210, 215.

The appellant, the managing director of a company which at all material times was insolvent, recovered judgment against the company for the repayment of a sum of money lent by him to the company. Shortly afterwards, the provisional liquidator of the company (against which a petition to wind up had been presented and which was subsequently, on April 28, 1925, ordered to be wound up) paid to the appellant the amount for which he had recovered judgment; and on April 21, 1926, an order was made in the winding up upon the appellant to repay to the liquidator that amount, on the ground that the payment to him by the liquidator was void as a fraudulent preference; and in consequence of the appellant's non-compliance with that order, a bankruptcy notice was served upon him; and, later, on July 29, 1926, a receiving order in bankruptcy was made against him, the Registrar refusing to allow the appellant to set off against the amount he had been so ordered to repay to the liquidator the sum for which he had recovered judgment against the company. On appeal from the receiving order:—

Held, that, the indebtedness of the appellant having been incurred under an order made after the date of the winding up, there were at that date no mutual debits capable of set-off; and the payment by the liquidator being void as a fraudulent preference, the appellant had not, at the date of the receiving order, any valid or effectual right of set-off in respect of the sum he had been ordered to repay to the liquidator, with the result that the appellant's only right was to prove in the winding up with the other creditors.

The principle of *Ex parte Pelly* (1882) 21 Ch. D. 492; *Flitcroft's Case* (1882) 21 Ch.D. 519; and *In re Leeds and Hanley Theatres of Varieties, Ld.* [1902] 2 Ch. 809 applied.

Appeal from County Palatine Court of Lancaster.

"British Garments, Ld.," a company registered in 1922, carried on business mainly by means of moneys borrowed by overdrafts from its bankers and was at all material times insolvent. On February 28, 1925, within less than a week of a demand made by the bank against the company for payment of its overdraft, the appellant, who was a director

of the company, issued a writ in the King's Bench Division against the company claiming payment of the amount due for moneys lent by him, and on March 18, 1925, recovered judgment against the company in default of appearance for the sum of 372*l.* 7*s.* 3*d.* On March 20, 1925, the company paid to the appellant 147*l.* 15*s.* on account of the amount due to him under his judgment. On March 26, 1925, a petition was presented by the bank to wind up the company. On March 27, 1925, by way of executing his judgment for the balance of the debt and to recover the costs of the execution, amounting to 31*l.* 13*s.* 9*d.*, the appellant issued a writ of fi. fa., and on the following day, March 28, the sheriff put the writ in force by seizure of some of the company's assets. On April 6, 1925, the provisional liquidator of the company (who had been appointed on March 31) in order to avert a sale paid to the appellant the amount claimed by the sheriff—namely, 256*l.* 6*s.*, the effect of which payment, coupled with the earlier payment of 147*l.* 15*s.*, was that the appellant obtained payment in full of his judgment debt. On April 28, 1925, an order was made by the Vice-Chancellor of the County Palatine Court of Lancaster for the compulsory winding up of the company, and on July 3, 1925, a liquidator was appointed.

By an order dated April 21, 1926, made by the Vice-Chancellor of the County Palatine Court of Lancaster at Manchester, on the motion of the liquidator in the winding up of the company, it was declared that the judgment of March 18, 1925, and all subsequent proceedings in the action were judicial proceedings suffered by the company in breach of s. 210 of the Companies (Consolidation) Act, 1908, and void as a fraudulent preference, and the moneys recovered thereunder were ordered to be repaid to the liquidator together with the taxed costs of the motion, and it was thereby further declared that the execution of the judgment was void under s. 211 of the last mentioned Act and that the payment of the 256*l.* 6*s.* was void also under s. 205 of the same Act; and the costs of the motion were ordered to be taxed and paid by the appellant to the liquidator.

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The appellant afterwards lodged his proof in the winding up for 769*l.* for salary due to him, but the liquidator rejected his proof. On May 14, 1926, a bankruptcy notice was issued by the liquidator against the appellant to pay 404*l.* 1*s.*, which the appellant had been ordered to repay under the final judgment or order of April 21, 1926; and on May 22, the appellant was duly served with the notice, and an application by him to have it set aside was adjourned pending the hearing of the appellant's appeal from the rejection by the liquidator of his proof. That appeal was heard by the Vice-Chancellor of the said Palatine Court on July 6, 1926, when leave was given to the appellant to prove for 224*l.* and the liquidator was ordered to pay to the appellant his costs of his appeal, which were subsequently taxed at 203*l.* 11*s.* 6*d.*

On July 9, 1926, an order was made by the Registrar in Bankruptcy refusing the application of the appellant to set aside the bankruptcy notice.

On July 29, 1926, a receiving order in bankruptcy was made against the appellant, the Registrar deciding that the appellant had no right to set off the sum of 831*l.* 12*s.* 6*d.*, the aggregate amount of the 404*l.* 1*s.*, 224*l.*, and 203*l.* 11*s.* 6*d.* which he claimed to be due to him from the company, against the sum of 744*l.* 11*s.* 6*d.*, being the aggregate amount of the 404*l.* 1*s.* by the order of April 21, 1926, directed to be repaid by the appellant, and 340*l.* 10*s.* 6*d.*, the taxed costs of the liquidator's motion, and claimed by the company to be due from the appellant, who accordingly appealed from those two orders of July 9 and 29, 1926.

Edward Clayton K.C. and *Tindale Davis* for the respondent took a preliminary objection against the appeal from the order of July 9, 1926, on the ground that it was out of time within r. 130 of the Bankruptcy Rules, 1915. The time for appealing was twenty-one days from the date of the refusal of the application to set aside the bankruptcy notice, and there existed no special circumstances which would induce the Court to exercise its power under that rule to

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extend the time, an objection against which counsel for the appellant offered no opposition.

E. W. Hansell for the appellant. It is plain from the judgment of Lindley L.J. in the Court of Appeal in *In re Washington Diamond Mining Co.* (1) that if the debt which the director in that case was claiming to set off had been an ordinary trade debt, and not one in respect of calls which he owed to the company, the decision of that Court would have been different and a set-off would have been allowed. That case turned on the special provisions in s. 38, sub-s. 7, of the Companies Act, 1862, and was like *Grissell's Case.* (2) The present is not a case of a claim by a director to set off his claim against the company against a liability of the director enforceable against him under the misfeasance section (s. 215 of the Companies (Consolidation) Act, 1908). In that case the payment by the company to the director of his fees was held to be a fraudulent preference, and he was ordered in the circumstances to repay them. Here the judgment which the appellant recovered for 404*l.* 1*s.* is still standing and has not been shown to be void. It was not the debt recovered thereunder, but the repayment of it by the liquidator which was held to be a fraudulent preference and void. The appellant therefore has a right to the set-off which he claims. As Fletcher Moulton L.J. pointed out in *Lister* v. *Hooson* (3), the jurisdiction in bankruptcy takes its origin from and still is grounded upon equitable principles. He could see no reason why the injustice should be perpetrated of making a person who was not a debtor to the estate pay in full the sum due to the estate and receiving only a dividend on the sum due from the estate, and he pointed out that in *In re Washington Diamond Mining Co.* (1) Lindley L.J. laid down that the right of set-off existed in the much stronger case of payments void as fraudulent preferences. He said that the disallowance of a set-off against calls between a limited company and its members in a winding up was to prevent preference being given before other creditors, and its

(1) [1893] 3 Ch. 95, 111, 112. (2) (1866) L. R. 1 Ch. 528.
(3) [1908] 1 K. B. 174.

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prohibition removed the only reason why a preferential payment in bankruptcy where a set-off is allowable was not fraudulent and void. In that case there was no debt due from the wife to the husband: she had no judgment for her debt, as the appellant in the present case has. Had she recovered judgment she would have been a creditor.

Edward Clayton K.C. and *Tindale Davis* for the respondent. If the contention of the appellant were to succeed, the effect would be to nullify s. 44 of the Bankruptcy Act, 1914, made applicable to companies by s. 210 of the Companies Act, 1908, the fraudulent preference section. There is no mutuality, because the one debt was owing to him by the company, but the money which has been recovered as a fraudulent preference could not have been recovered by the company but only by its liquidator after a winding up. In the *Washington Diamond* case (1) the mutual dealing took place before the winding up; while here the mutual dealing set up by the appellant was after the winding up. The levying of the execution when the company was being wound up was void under s. 211 of the Companies (Consolidation) Act, 1908, and the payment of the 256*l.* 6*s.* to the appellant after the commencement of the winding up was void under s. 205, sub-s. 2, of that Act. The payment by the appellant as managing director to himself of the 147*l.* and the 256*l.* involved a misfeasance under s. 215. The Court is entitled to go behind the judgment which the appellant holds and, if it is satisfied that there was no real debt enforceable under it, there can be no set-off: *In re Van Laun* (2); *In re A Debtor.* (3) The present case is covered by *Ex parte Pelly* (4); *Flitcroft's Case* (5); and *In re Leeds and Hanley Theatres of Varieties, Ld.* (6)

Hansell in reply. The judgment of April 21, 1926, was not based on misfeasance: it was grounded on fraudulent preference and absence of consideration for the money paid to the appellant.

(1) [1893] 3 Ch. 95.
(2) [1907] 2 K. B. 23.
(3) [1917] 2 K. B. 60.
(4) 21 Ch. D. 492.
(5) 21 Ch. D. 519.
(6) [1902] 2 Ch. 809.

[Clauson J. The language of s. 215 is not restricted to a misfeasance; but it includes the case of a director who has become liable or accountable for any money or property of the company.]

Astbury J. [after stating the facts above set out proceeded as follows:] On the appellant's side of the account there are the judgment for 372*l.* 7*s.* 3*d.* recovered by him on March 18, 1925, the sum of 31*l.* 13*s.* 9*d.* costs of executing the writ of fi. fa., the 224*l.* for which he was on appeal allowed to prove in respect of his arrears of salary, and 203*l.* 11*s.* 6*d.* his costs of the appeal, making together the sum of 831*l.* 12*s.* 6*d.*, which the appellant claims to be due to him from the company. On the other side of the account there is the judgment of the Vice-Chancellor in favour of the liquidator for 404*l.* 1*s.* and the 340*l.* 10*s.* 6*d.* for costs, making in all the sum of 744*l.* 11*s.* 6*d.*, and Mr. Hansell on behalf of the appellant says that on those figures there is a balance on this account, if set off, of 87*l.* 1*s.* in favour of the appellant as against the liquidator. On the bankruptcy petition coming on a receiving order was made against the appellant on July 29, 1926, which is one of the orders appealed against.

The first matter which has been argued is whether or not the appellant has a good set-off under the mutual credit clause or otherwise in respect of the sum of 404*l.* 1*s.* mentioned in the bankruptcy notice. It is argued that, although the appellant was under the judgment of April 21, 1926, ordered to repay to the company the 147*l.* 15*s.* and the 256*l.* 6*s.*, making together 404*l.* 1*s.*, his original judgment nevertheless stands and that he is entitled to set off the amount recovered thereunder against the judgment obtained by the company for repayment. Assuming that the appellant's judgment is a valid and enforceable one, the question that we have to decide is, whether, under the circumstances, there is any set-off at all. It appears to me that, if a set-off were allowed in these circumstances, it would be reducing the fraudulent preference section—s. 44 of the Bankruptcy Act, 1914, made applicable to a company by s. 210 of the Companies

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(Consolidation) Act, 1908—to a nullity. Here there was no mutual dealing between the appellant and the company at all, until after the winding up. On the winding up taking place, an order was obtained by the liquidator against the appellant for the sum which is said to be and to consist of a mutual credit. In my opinion it is nothing of the kind. *In re Washington Diamond Mining Co.* (1) is relied upon by Mr. Hansell on behalf of the appellant, and he contended that, if in that case the debt against which the set-off was claimed had been a debt of an ordinary trader and not one in respect of calls due to a company, the decision would have been different and a set-off would have been allowed. In that case, however, there were two totally separate debts or credits or debits. One was the liability of a director to pay the calls on his unpaid shares, the other was the liability of the company to him in respect of his director's fees; and, I think, that it may be the case that, had it not been for the fact that the debt attempted to be set off was one in respect of unpaid calls, there would have been, as Lindley L.J. points out (2), a right of set-off both before and after the bankruptcy in respect of those two separate and independent debts. Mr. Hansell next relies on a passage in the judgment of Fletcher Moulton L.J. in the case of *Lister* v. *Hooson* (3), where that learned Lord Justice said: "The right of set-off in bankruptcy has been dealt with by various statutes, but takes its origin from the fact that the jurisdiction in bankruptcy was from the first an equitable jurisdiction. The successive statutory formulations of the consequence of this principle, embodied in the clauses as to mutual credit, dealings, etc., have never altered this fundamental principle, and, speaking for myself, I cannot see any ground why in the present instance the injustice should be perpetrated of making a person who in the balance is not a debtor to the estate pay in full the sum due to the estate and receive only a dividend on the sums due from the estate." In that case there was a difference of opinion

(1) [1893] 3 Ch. 95. (2) [1893] 3 Ch. 111.
(3) [1908] 1 K. B. 174, 178.

in the Court on the question of fact as to whether there was a debt due from the wife to her husband, the bankrupt, against which the wife claimed the right to set off a debt due to her from him; and the majority of the Court held that there was no such debt which could be set off against the debt due from the husband to her. But Fletcher Moulton L.J. continues (1): "Lindley L.J. laid down in the Court of Appeal that the right of set-off existed in the much stronger case of payments void as fraudulent preferences: *In re Washington Diamond Mining Co.* (2); and damages due to fraudulent representation in the sale of an article, although they are of the nature of unliquidated damages and can only become a debt by action brought by the trustee, were, in the case of *Jack* v. *Kipping* (3), held to be the subject of set-off, and I can see no reason whatever why the circumstances of the present case should prevent it being applied in the present case." That proposition is not, as far as I can understand it, assented to by Buckley L.J. in his judgment in the same case; but it becomes unnecessary to discuss the exact result of that dissenting judgment, having regard to a considerable number of decisions in which the exact point we have to decide has been determined. In *Ex parte Pelly* (4), where a misfeasance debt was ordered to be paid by one of the directors of the company to whom the company was indebted for money advanced for expenses, it was held that he could not set off the debt against his liability for misappropriation of the company's money. Sir George Jessel said (5): "It is suggested that one of the appellants, Captain Pelly, being a creditor of the company for money lent, is entitled to set off the amount due to him against the amount which may be found due from him under the 165th section"—that is the same as s. 215 of the Companies (Consolidation) Act, 1908—"I think not. In the first place the right of set-off is not a common law right, it is a statutory right, and it is grounded upon the statutes, which limit it in various ways. No one

(1) [1908] 1 K. B. 178.
(2) [1893] 3 Ch. 95.
(3) (1882) 9 Q. B. D. 113.
(4) 21 Ch. D. 492.
(5) 21 Ch. D. 502.

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can suggest that a summons under the 165th section is within those statutes. Therefore it appears to me there is no right of set-off at all. But there is another ground. It is said assuming it not to be within the right of set-off, still the Court ought to give the appellant the same benefit under the 165th section as if an action had been brought against him. Well, I am not at all able to see that. The power given by the Act is to compel him to repay moneys which he has so applied or retained, or for which he has become liable or accountable, together with interest after such rate as the Court thinks just. So that the Court has power by statute to make him repay. If the statute had intended that he should have a right of set-off, why did it not say so?" Hall V.-C., in giving judgment in that case upon the question whether one of the directors named Pearse was entitled to a set-off, said (1): "In this case I have already held Mr. Pearse liable under the 165th section of the Companies Act, 1862, to pay to the liquidator a portion of certain promotion moneys, which portion I considered he had improperly received. He has claimed to set off against this amount a sum which he says the company owed to him at the date of the winding up. . . . . A liability under the 165th section"—that is the misfeasance section, s. 215 of the present Act—"is a liability of a delinquent, and until the order directing payment in respect of it has been made should not be treated (in the delinquent's favour) as a debt from him to the company, so as to entitle him to a set-off. At the time of the winding up it could not be said by Mr. Pearse that there were mutual debts. An order under the 165th section is an order at the instance of the liquidator, creditor or contributory, not upon a claim by the company." Then, further on, the Vice-Chancellor says: "The 101st section of the Act"—the equivalent of which is s. 165 of the present Act of 1908—"provides for a set-off in certain cases, but treating the sum payable by Pearse as a debt of his (which for the present purpose I think it is not) he is not, according to the section, entitled to set off, the section being, I think, strongly adverse

(1) 21 Ch. D. 498, note (1).

to his claim of set-off." In *Flitcroft's Case* (1) the Court held that directors could not set off moneys due from the company to them against amounts which, under s. 165 of the Companies Act, 1862, they were ordered to replace. Now that seems to me the exact point which has been raised in the present case. Similarly in the case of *In re Leeds and Hanley Theatres of Varieties, Ld.* (2), the F. company and the T. company were both in liquidation. The F. company were creditors of the T. company for 500*l.* under debentures of the T. company, and were also debtors to the T. company for misfeasance, and Buckley J. held that, on the authority of *Ex parte Pelly* (3), there was no mutual credit and there could be no set-off of the debt against the liability for misfeasance, a liability which was not established until the order against the F. company to pay the T. company had been obtained by the liquidator of the T. company.

For these reasons, in my judgment, the appellant in the present case has not established that at the date when the application for the receiving order was made he had any valid or effectual set-off in respect of the 404*l.* 1*s.* which is the subject-matter of that petition.

This appeal from the receiving order made on July 29, 1926, must be dismissed. With regard to the appeal from the order of July 9, 1926, that appeal is out of time and must consequently be dismissed also.

CLAUSON J. I agree. If a creditor of a company receives payment of the sum due to him in such circumstances that the payment amounts to a fraudulent preference, the position is that he has no right to receive his debt in full, but has a right only to be paid a dividend on his debt pari passu with the other creditors: the decision of the Court, in a winding up subsequently supervening, that the payment to him was a fraudulent preference, must necessarily amount to a decision that he had no right to receive his debt in full, but had a right only, in the circumstances, to claim pari

(1) 21 Ch. D. 519. (2) [1902] 2 Ch. 809.
(3) 21 Ch. D. 492.

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passu with the other creditors. It would be an absurdity if the appellant were entitled to set off, against the claim of the liquidator for the money which he wrongly received in full, a claim to be paid under his judgment an equivalent amount as a debt. The most that the appellant can be entitled to is to rank pari passu with the other creditors. That this must be so in bankruptcy was frankly recognized by Mr. Hansell in his very candid argument; and he agreed, as I understood, with the view propounded to him that, if his argument were correct, the fraudulent preference section would be wholly impotent. His answer was that in bankruptcy there was a cessio bonorum from the bankrupt to the trustee, while there is no cessio bonorum to the liquidator. I can see no ground for the suggestion that the absence of a cessio bonorum makes a difference. The legislature has chosen by the Companies (Consolidation) Act, 1908, to enact that fraudulent preference in the case of the winding up of a company should be treated in the same manner as fraudulent preference in the case of bankruptcy. That seems to me to make it impossible for Mr. Hansell to contend with success that there is any distinction in this respect between bankruptcy and winding up. It seems to me to follow that the set-off which the appellant claims cannot be allowed.

Solicitors: *F. Wilson Foley, for Victor B. Parker, Manchester; H. A. Sims & Co., for Alfred Riley & Son, Blackburn.*

H. C. H.

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GIBBS *v.* LASSAM.

[1926. E. 1434.]

Will—Construction—Bequest of Income of one-third Part of Residue to E. E., and after her Decease such one-third Part to be divisible between J. G. and S. L., or "if dead between their issue share and share alike"—Death of J. G. in Lifetime of E. E.—Issue of J. G. take the Moiety of the one-third Part in equal Shares per capita.

The testator gave the income of the one-third part of his residuary estate to his daughter E. for her own absolute use and benefit, and from and after her decease such one-third part was to be divisible between his daughters J. G. and S. L., or "if dead between their issue share and share alike." J. G. died in the lifetime of E., leaving issue:—

Held, that on the death of E. the issue of J. G. took a moiety of the one-third part of the testator's residuary estate in equal shares per capita.

The rule applied by Kay J. in *In re Hutchinson's Trusts* (1882) 21 Ch. D. 811 applies in cases of substitutionary gifts.

By his will dated April 5, 1883, the testator, after making certain bequests, devised and bequeathed all the residue of his estate to the use of his daughter, Elizabeth Errington, and his son in law, Tom Gibbs, upon trust for sale and conversion, and out of the proceeds thereof to pay his funeral and testamentary expenses and debts and the legacies bequeathed by his will, and to invest the residue as therein mentioned, and upon trust to pay the annual income thereof to his wife during her life, and from and after her death as to one-third part thereof upon trust to pay the same to his daughter, Elizabeth, for her separate use, and he declared that if any of his children should die in his lifetime or in the lifetime of his wife without leaving issue him or her surviving, the share or shares of such child or children so dying should go to and be equally divided between the survivors or survivor of them in manner thereinbefore mentioned, but if any of his children so dying should leave issue him or her surviving, such issue should take (equally amongst them, if more than one) their, his or her deceased parent's share. By a codicil dated July 13, 1888, the testator, after reciting that by his will his daughter, Elizabeth, was entitled to

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one-third part of his residuary estate, declared his will and intention to be that she should be entitled only to the income to be derived from such one-third part for her own absolute use and benefit, and that from and after her decease such one-third part should be divisible between his daughters, Jane Gibbs and the defendant, Susanna Lassam, or "if dead, between their issue, share and share alike."

The testator died on July 13, 1888, and his wife on May 26, 1898. Jane Gibbs died on March 30, 1925, and Elizabeth Errington died on July 30, 1926, a spinster. Jane Gibbs had nine children, one of whom predeceased her, a bachelor and intestate, two predeceased her, leaving issue. One of her grandchildren died in her lifetime, an infant. Two of her grandchildren were born after her death, but in the lifetime of Elizabeth. Susanna Lassam had three children and several grandchildren.

The present trustees of the testator's will took out this summons asking whether, upon the true construction of the will and in the events which had happened: (*a*) the defendants, Susanna Lassam and Jane Gibbs, on the death of the testator, each acquired a vested and indefeasible interest in remainder expectant on the life interest of Elizabeth Errington in one moiety of the one-third part of the testator's residuary estate; or (*b*) the whole of such one-third part on the death of E. E. passed to the defendant, Susanna Lassam; or (*c*) such one-third part on the death of E. E. passed: (1.) as to one moiety thereof to the defendant, Susanna Lassam, and as to the other moiety thereof to the issue of Jane Gibbs; or (2.) to the defendant, Susanna Lassam and her issue and the issue of Jane Gibbs; (*d*) if issue of the defendant, Susanna Lassam and Jane Gibbs or either of them were entitled to participate, then at what time the class of issue was ascertainable, and whether such issue was confined to children, or included grandchildren and later descendants; (*e*) whether distribution was per capita or per stirpes.

H. A. Hind for the plaintiffs.

Bischoff for the defendant, Susanna Lassam, contended

that on the death of Elizabeth Errington, Susanna Lassam took the whole of the one-third part, or, in the alternative, that she took the moiety of such one-third part absolutely.

F. D. Morton for a daughter of Susanna Lassam. On the true construction of the will it is plain that on the death of Elizabeth her one-third part goes over to the issue of Jane and Susanna, share and share alike; it is a clear gift to that class. There is nothing in the will to say that the share of Jane is to go to her issue only. It is true that *In re Hutchinson's Trusts* (1) is against me, but there Kay J. reluctantly adopted an artificial rule of construction. That case and other cases in which the rule has been applied were cases of original gifts, while in this case we are dealing with a substitutional gift. There is nothing therefore to prevent the Court giving effect to the plain meaning of the will.

[He also cited *In re Stanley's Settlement.* (2)]

L. B. Tillard for children of Jane Gibbs. The words "if dead" mean if either of them be dead, and the moiety of the one-third part goes to the issue of the one dead. *In re Hutchinson's Trusts* (1) applies. This is a substitutional gift, and therefore no issue of Jane take who did not survive her.

J. V. Nesbitt for the daughter of a deceased child of Jane Gibbs. The word "issue" here includes all the children of Jane: *In re Embury.* (3)

Dighton Pollock, G. D. Johnston, W. S. Norwood, Cleveland-Stevens, and *A. B. Nutter* for other defendants.

ROMER J. In this case I have to construe the gift contained in the codicil to the testator's will.

Elizabeth died on July 30, 1926. Unfortunately, Jane and Susanna did not both survive her; Jane had died the year previously leaving numerous issue, children and grandchildren; Susanna was and is still living, but she, too, has issue, children and grandchildren. The question I am asked to decide is as to how, on the death of Elizabeth Errington, her one-third share is to be divided.

(1) 21 Ch. D. 811. (2) [1916] 2 Ch. 50.
(3) (1913) 109 L. T. 511.

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On behalf of Susanna Lassam, the survivor of the two, it is contended that she takes the whole. Mr. Bischoff contented himself with asserting that she took the whole, but without adducing any argument which would enable me to come to that conclusion. It is plain to my mind that she does not take the whole. Nor are there any words in the will which are capable even of being twisted into such a conclusion. But then it was said on her behalf that she, notwithstanding the fact that her sister Jane died in the lifetime of Elizabeth, takes one-half absolutely, whatever may be the destination of the other half. Her children and grandchildren, on the other hand, say that though Susanna and Jane would have taken the whole of Elizabeth's share if they had both survived her, yet inasmuch as Jane predeceased Elizabeth leaving issue, Susanna is deprived of her share as well, and not only does Jane's share go to her issue or to the issue of Susanna and Jane, but Susanna's share also goes over. That is too capricious an intention to attribute to any testator. Most assuredly I shall not adopt that construction, unless I am driven to do so by the words that the testator has used or by the authorities which bear upon the matter.

It is said, of course, on behalf of Jane's issue, that they at any rate are entitled to Jane's half even if they are not entitled also to share in what I may call Susanna's half. As between them, the issue, supposing they are entitled, the further question arises as to whether "issue" means issue generally or only children, and, finally, whether children or issue who failed to survive Jane can take under the gift in question.

I will go back now to the words of the codicil. The words "or if dead" obviously require the introduction of some words to explain them. The words "if dead" convey nothing to the mind, unless the speaker points out the subject-matter to which those words are to be applied. So the first thing I have to ascertain is what do the words "if dead" refer to. Do they mean if one of them be dead, or if both of them be dead? Prima facie and grammatically it appears to me that the words "if dead" mean if both be dead;

there being a direction to divide between two people or if dead between their issue.

I have got then a direction to divide between two people, A. and B., on the death of a tenant for life, with the direction that if both be dead there is to be a division amongst their issue. There, again, grammatically it would mean that if both be dead then the issue of both are to take. If that is the true construction of the will, that is to say, if the gift over only takes effect if both are dead in favour of the issue of both, the gift over in the present case would not have taken effect at all. It appears to me, however, that I am not at liberty to construe the words used by the testator in that way.

There is a rule of construction referred to by Kay J. in *In re Hutchinson's Trusts* (1) which is so binding that Kay J. felt, in the case before him, compelled to give effect to it, although but for the authorities laying down that rule of construction he would have decided differently. The rule, stated in its simplest way, is this: Where a testator gives the income of his estate to two people, A. and B., for their lives and follows that gift by a direction that at their death, or at their deaths, or at or after the death or deaths of A. and B. the property is to go to their issue, the Court does not construe the gift as a gift only to take effect on the death of both in favour of the issue of both, but construes it as a gift, to take effect on the death of each, of the share to the income of which the deceased was entitled, to the issue of the deceased. So that in the simple cases to which I refer, on the death of A. leaving issue, the issue of A. would take one-half notwithstanding the fact that B. still was living. On the death of B., B.'s issue in the same way would take the share in which B. had a life interest. Now, it is true that the cases in which that rule has been applied were cases of original gifts. But I see no reason at all why the rule should not equally apply to cases of substitutional gifts. The rule admittedly applies, as was laid down by Kay J., where there is a gift to A. and B., not expressly for life, but a

(1) 21 Ch. D. 811.

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gift to A. and B., followed by an original gift in favour of the issue of A. and B. expressed to take effect in the event of the deaths or on the deaths of A. and B. In such a case Kay J. held that on the death of one his issue took his share.

I myself see no difference between that case and a gift to A. and B. with a substitutional gift in favour of their issue to take effect in the event of their deaths. I think in such a case the Court ought to construe the gift as a gift to A. and B., with a substitutional gift of A.'s share in favour of his issue, and B.'s share in favour of his issue. It is a rule which appears to me to be one that has this supreme merit, a merit that not all rules of construction possess, that in the vast majority of cases it gives effect to the intention of the testator.

I therefore arrive at the conclusion that in this case I must construe the codicil as if the testator had provided that the property was to be divided between these two sisters, but that in the event of either being dead at the time of the distribution the issue of that one were to stand in her stead and take by way of substitutional gift.

Then the next point I have to determine is as to whether "issue" means children or means issue generally. I have been referred to a clause in the will of the testator in which he has provided as to what is to happen in the case of children of his dying in his lifetime, or in the lifetime of his widow leaving issue, and as to what is to happen in the case of their so dying not leaving issue. It may well be that if I had to construe that clause I should come to the conclusion that throughout the clause the testator had used the word "issue" as meaning children, but it by no means follows that he has not used the word "issue" in his codicil in its prima facie and natural sense. I do not think I should be justified in this clause in a codicil in giving the word "issue" less than its natural and prima facie meaning because, in a clause in another part of his testamentary disposition, a different instrument altogether, the testator has, in providing for the death of his children in other events, used the word "issue" in a different sense. I think I ought to give the word "issue"

in the codicil its natural and prima facie meaning, none the less that by the codicil he confirms his will.

I arrive therefore at the conclusion that the issue of Jane Gibbs take in substitution for her, and inasmuch as it is a substitutional gift it also follows that those of her issue who predeceased her will not share in the distribution, it being a well recognized rule that in substitutional clauses the Court never substitutes the dead for the dead, and, therefore, for Jane, who is dead, must be substituted only those of her issue who were living at her death, or who were born after her death in the lifetime of Elizabeth. Such issue will take in equal shares per capita.

Solicitors for all parties: *John E. Gibbs & Co.*

P. J. B.

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[1926. H. 3259.]

Compulsory Purchase—Land required for military Purposes—Certificate of deputy Lieutenants of Necessity or Expediency—Landowner's Claim to be heard—Condition Precedent—Arbitration—Defence Act, 1842 (5 & 6 *Vict. c.* 94), *ss.* 15, 19, 23—*Acquisition of Land (Assessment of Compensation) Act*, 1919 (9 & 10 *Geo.* 5, *c.* 57), *ss.* 1, 7.

Where land is being acquired compulsorily for military purposes under the Defence Act, 1842, the certificate that the taking of the land is necessary or expedient, which by s. 23 must first be made by the lord lieutenants or two deputy lieutenants of the county or riding in which the land is situated, is duly granted, although the person whose land is being acquired has not been heard; for the granting of such a certificate is not a judicial but a merely administrative act.

It is not a condition precedent to the summoning of a jury under the Defence Act, 1842, s. 19, to assess the compensation payable to the owner of the land, that the Secretary of State for War shall have been put into possession of the land under the section; but even if it was that condition precedent would have no application to the assessment, of compensation in such a case under the Acquisition of Land (Assessment of Compensation) Act, 1919.

MOTION.

The plaintiff was the tenant for life of settled estates near Richmond, in Yorkshire, and in 1924 negotiations were

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commenced on behalf of the Secretary of State for War for the acquisition of part of these lands for military purposes. The lands sought to be acquired were duly marked out, and on August 5, 1925, the military authorities obtained the certificate of two deputy lieutenants of the north riding that the taking of the land was necessary or expedient. This certificate was obtained without the knowledge of the plaintiff, who stated in evidence that he first became aware of it in March, 1926. A Treasury warrant authorizing the acquisition of the land was also obtained, and on October 2, 1925, the Secretary of State gave notice to treat with a view to the compulsory acquisition of the land.

Further negotiations ensued, but proved fruitless, and in September, 1926, application was made on behalf of the Secretary of State for the appointment of an official arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919. The defendant, John Willmot, was appointed arbitrator.

On December 16, 1926, the plaintiff commenced proceedings against the Attorney-General, Sir Laming Worthington-Evans, who is the present Secretary of State for War, and the official arbitrator for (amongst other things) a declaration that the certificate granted in August, 1925, was null and void. He now moved for an interim injunction to restrain the defendant, Sir Laming Worthington-Evans, from taking or continuing any proceedings before the official arbitrator for the assessment of compensation, and to restrain the defendant, Willmot, from holding or continuing such proceedings. (1)

Schiller K.C. and *H. G. Robertson* for the plaintiff. The War Office are seeking to acquire the plaintiff's land under the Defence Act, 1842, and the land in question has been duly marked out and surveyed in accordance with s. 16. The power to acquire land compulsorily is contained in s. 19,

(1) Proceedings had been commenced at an earlier date by the plaintiff against the Secretary of State for War in his official capacity, but a motion similar to the present motion was dismissed on the ground that the proceedings would not lie.

and was conferred on the principal officers of Her Majesty's Ordnance, but by the Act 18 & 19 Vict. c. 117, s. 1, the rights under the Defence Act were transferred to the Secretary of State for War. Further, a new tribunal has been instituted for assessing compensation by the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 1, in place of the jury to be summoned to value the premises under s. 19 of the Act of 1842.

The plaintiff is now claiming an injunction to prevent the holding of the arbitration to fix the amount of compensation on the ground that the condition precedent to the exercise of the compulsory powers contained in s. 23 (1) has not been duly complied with. It is true that a certificate of two deputy lieutenants was obtained, but this was done without the knowledge of the plaintiff and without giving him an opportunity of being heard. In granting their certificate of necessity or expediency, the deputy lieutenants were acting as a quasi-judicial tribunal, and could not properly grant a certificate without hearing the plaintiff: *Everett* v. *Griffiths* (2); *Spackman* v. *Plumstead District Board of Works* (3); *Cooper* v. *Wandsworth District Board of Works* (4); *Local Government Board* v. *Arlidge*. (5)

[TOMLIN J. The question is whether s. 23 involves the determination of the matter between the parties or merely provides that the War Office must, as a preliminary to

(1) Defence Act, 1842, s. 23: "Provided always, and be it enacted, that no such lands, buildings, or other hereditaments shall be so taken without the consent of the owner or owners thereof . . . . unless the necessity or expediency of taking the same shall be first certified by the lord lieutenant, or two of the deputy lieutenants, or by the governor or two deputy governors of the county, riding, stewartry, city, or place in which such lands, buildings, or other hereditaments lie, and unless the taking of such lands, buildings, or other hereditaments be authorized by a warrant under the hand or hands of the Lord High Treasurer or of the Commissioners of Her Majesty's Treasury of the United Kingdom of Great Britain and Ireland, for the time being, or any three or more of them, or unless the enemy shall have actually invaded the United Kingdom at the time when such lands, buildings, or other hereditaments shall be so taken."

(2) [1921] 1 A. C. 631.

(3) (1885) 10 App. Cas. 229.

(4) (1863) 14 C. B. (N. S.) 180.

(5) [1915] A. C. 120.

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acquiring land compulsorily, obtain the certificate of independent officers as to its necessity or expediency.]

It is a very serious thing to take the land of a subject against his will, and it is submitted that the obtaining of this certificate was made necessary for the subject's protection, and that it is therefore a matter on which he is entitled to be heard. It was not necessary for the plaintiff to contend that he was entitled to be heard before the Treasury warrant was granted. The authorities already cited show that when persons are appointed to come to a decision affecting the rights of a subject, he is entitled to be heard before the matter is decided.

[TOMLIN J. Is not the certificate given under s. 23 relative to a matter of policy on which there is no reason that the owner of the land should be heard?]

The inquiry by the deputy lieutenants is wider than that. An owner might be able to show that there is other land in the neighbourhood more suited, and the taking of which will cause less injury, and that on this ground it is neither necessary nor expedient that the particular land should be taken.

Again, s. 19 of the Defence Act provides for the War Office being let into possession by two or more justices of the peace or three or more deputy lieutenants, one of whom is a justice of the peace; and it is only after this has been done that a jury can be summoned to value the premises. Here the War Office have not been let into possession, and on this ground also the Court should grant an injunction preventing the holding of the arbitration.

Sir Douglas Hogg A.-G. and *Dighton Pollock* for the defendants. As regards the second of the two points raised, while the construction of s. 19 that has been suggested is not admitted, it is sufficient to point out that the provision as to calling a jury has been superseded by the Acquisition of Lands (Assessment of Compensation) Act, 1919, s. 1, which is not subject to any such prior condition, and by s. 7 supersedes the provisions of the earlier Act in so far as inconsistent with it.

As regards the plaintiff's main contention the law in regard to the subject is laid down by Willes J. in *Cooper* v. *Wandsworth District Board of Works* (1): "I apprehend that a tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds." It is submitted that the lord lieutenant or his deputy lieutenants, in making a certificate under s. 23, are not such a tribunal. The persons on whom the duty of granting the certificate is laid are not persons having any judicial duty. They were chosen because in 1842 they were the head of the military forces of the county, and were therefore very suitable persons to decide whether the acquisition of the land was necessary or expedient for military purposes. The historic position of the lord lieutenant and his deputies is laid down in the Law Magazine and Law Review, 1862–3, p. 46. (2) In 1842 the lord lieutenant's position (originally that of a statutory commissioner of array) was that laid down in an Act of 1802 (42 Geo. 3, c. 90), which was an Act dealing with the raising of militia, while the deputy lieutenants were persons entitled to act for him while he was out of the kingdom. His whole duty was to manage and control the military forces of the county, so that his duties were exclusively military: ss. 2, 3, 5. In 1803, only a year later, the Act 43 Geo. 3, c. 55 was passed as a temporary measure, which is the prototype of the Act of 1842. That Act was amended by 44 Geo. 3, c. 95, and s. 10 of that Act contained the provision with regard to making a certificate now contained in s. 23 of the 1842 Act. Therefore immediately after the entirely military duties of the lord lieutenant have been recognized, he is appointed as the person to certify as to the necessity or expediency of taking land for military purposes. The object of s. 23 is therefore clear. The local head of military affairs was to certify as to necessity or expediency, and the warrant of the Treasury was to be obtained as a financial check on what was proposed.

(1) 14 C. B. (N. S.) 180, 190.

(2) See also the article "Lord Lieutenant" in the Encyclopædia of the Laws of England, 2nd ed., 1907.

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It is submitted, therefore, that s. 23 was not concerned with the appointment of a judicial tribunal for the protection of the subject, but simply to protect the Crown by insuring that what was proposed was necessary or expedient from a military and financial point of view.

[TOMLIN J. If this be so, the curious result follows that the subject is liable to have his land taken compulsorily without ever being given an opportunity of being heard.]

No doubt that is so. But it has to be remembered that this is a Defence Act. Moreover, if a judicial inquiry had been intended, some one with a judicial position would surely have been appointed to hold it. On these grounds it is submitted that the granting of the certificate was a purely administrative act and that the plaintiff had no right to be heard.

Morton for the arbitrator.

H. G. Robertson in reply.

TOMLIN J. In this case the plaintiff is the owner of a large estate in Yorkshire, and he sues His Majesty's Attorney-General, and the Rt. Hon. Sir Laming Worthington-Evans, and Mr. John Willmot. Sir Laming Worthington-Evans is the present Secretary of State for War, and is being sued in his personal capacity, and Mr. Willmot is being sued as the arbitrator, appointed in circumstances which I will shortly explain. The motion is a motion to restrain until the trial the defendant, Sir Laming Worthington-Evans, from taking or continuing any proceedings before the defendant, John Willmot, under the Acquisition of Land (Assessment of Compensation) Act, 1919, for the assessment of the compensation or purchase price to be paid for the compulsory acquisition of part of the plaintiff's land, and the defendant, John Willmot, from holding or continuing any such proceedings.

The circumstances of this case are as follows:—

The War Office required certain lands in Yorkshire for military purposes, and took steps under the Defence Act, 1842, to acquire those lands. On August 5 and 6, 1925,

certificates were signed by two deputy lieutenants of the riding, under s. 23 of the Act, to the effect that it was necessary or expedient that the land should be acquired, and under the same section the taking of the lands has been authorized by a warrant of the Treasury. On October 2, 1925, notice was served on the plaintiff under an earlier section of the Act, requiring him to agree the purchase price of the lands; but it was not until March, 1926, that the plaintiff became aware of the signing of the certificates by the deputy lieutenants. The Defence Act, 1842, provides by s. 16: "That it shall be lawful for the principal officers of Her Majesty's Ordnance for the time being"—they are now represented by the Secretary of State for War—"to enter on, survey, and mark out, or to cause to be surveyed and marked out, any lands, buildings, or other hereditaments or easements wanted for the service of the Ordnance Department, or for the Defence of the Realm, or to stop up or divert any public or private footpaths or bridle-roads, and to treat and agree with the owner or owners of such lands, buildings, hereditaments, or easements, or with any person or persons interested therein, either for the absolute purchase thereof, or for the possession or use thereof during such time as the exigence of the public service shall require."

Then, under s. 13, power is conferred on various bodies, and on trustees and tenants for life, to agree to the sale of land. Sect. 19 provides: "That in case any such bodies or other persons hereby authorised to contract on behalf of themselves or others as aforesaid, or any other person or persons interested in any such lands, buildings, or other hereditaments which shall be so marked out and surveyed as aforesaid, shall for the space of fourteen days next after notice in writing subscribed by or on behalf of the said principal officers shall have been given, ... refuse or decline to treat or agree, ... then in such case it shall be lawful for the said principal officers to require two or more justices of the peace, or three or more deputy lieutenants (one of whom shall be a justice of the peace), ... to put the said

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principal officers, or any person appointed by them, into immediate possession of such lands, buildings, or other hereditaments, which such justices or deputy lieutenants . . . . are hereby required to do, and shall for that purpose issue their warrants under their hands and seals, commanding possession to be so delivered, and shall also issue their warrants to the sheriff of the county, riding, ... or place wherein such lands, buildings or hereditaments shall be situate, to summon a jury; . . . . and the jury, on hearing any witnesses and evidence that may be produced, shall on their oaths (which oaths, as also the oaths of such witnesses, the said justices, the deputy lieutenants, or governors respectively are hereby empowered and required to administer), find the compensation to be paid. . . . ." Then the following three sections deal with matters of detail in connection with that procedure, and they are followed by s. 23, which is the relevant section, so far as the principal point made by the plaintiff is concerned: "Provided always, and be it enacted, that no such lands, buildings or other hereditaments shall be so taken without the consent of the owner or owners thereof, or of any such person or persons as aforesaid, acting for or on the behalf of the owner or owners thereof, unless the necessity or expediency of taking the same shall be first certified by the lord lieutenant, or two of the deputy lieutenants, ... of the county, riding, stewartry, city, or place in which such lands, buildings or other hereditaments lie, and unless the taking of such lands, buildings or other hereditaments be authorised by a warrant under the hand or hands of the Lord High Treasurer, or of the Commissioners of Her Majesty's Treasury of the United Kingdom of Great Britain and Ireland, for the time being, or any three or more of them, or unless the enemy shall have actually invaded the United Kingdom at the time when such land, buildings or other hereditaments shall be so taken."

The Acquisition of Land (Assessment of Compensation) Act, 1919, provides by s. 1, sub-s. 1: "Where by or under any statute (whether passed before or after the passing of this Act) land is authorised to be acquired compulsorily by

any Government department or any local or public authority, any question of disputed compensation, ... shall be referred to and determined by the arbitration of such one of a panel of official arbitrators to be appointed under this section as may be selected in accordance with rules made by the Reference Committee under this section." Sect. 7, sub-s. 1, of the same statute enacts: "The provisions of the Act or order by which the land is authorised to be acquired, or of any Act incorporated therewith, shall, in relation to the matters dealt with in this Act, have effect subject to this Act, and so far as inconsistent with this Act those provisions shall cease to have or shall not have effect. . . . ." So that the result of that Act is that the method of assessing compensation to-day, where the land is being taken under the Defence Act, 1842, is ultimately by arbitration under the Act of 1919.

Now, as I have said, the certificates required under s. 23 of the Act of 1842 were obtained, although they were obtained without notice to the plaintiff or any knowledge on his part that they were being obtained. It seems that negotiations had taken place between the War Office and the plaintiff as to the purchase price to be paid for the land, and that he had in fact put in a claim for a sum of 60,000*l.*, a figure which the War Office were not prepared to pay, with the result that the War Office proceeded, under the provisions of the Act of 1919, to have the compensation settled by an arbitrator under that Act. Thereupon the plaintiff raises the point that, under the Defence Act, 1842, the compulsory powers are conditional upon the certificate of the two deputy lieutenants being obtained under s. 23 of that Act, and that the decision as to the necessity and expediency of the taking of the land is a judicial matter, so that the deputy lieutenants are not entitled to give a certificate without first affording to the owner of the land an opportunity of being heard upon the question.

Mr. Schiller, on behalf of the plaintiff, has cited to me a number of cases to establish the proposition that a body of this sort, with functions of this sort, is acting in a judicial

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capacity, and that nothing it can do will be effectual or valid unless the parties concerned are heard. I am not sure that he did not frame his proposition a little too wide; but the real principle, as stated by Willes J. in *Cooper* v. *Wandsworth District Board of Works* (1), is not disputed by the Attorney-General. Willes J. said: "I apprehend that a tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds; and that that rule is of universal application, and founded upon the plainest principles of justice." That is a proposition with which the Attorney-General does not, and, of course, could not, quarrel. In that case the learned judge proceeded to consider whether the Wandsworth District Board was such a tribunal, and held upon the facts of that case that it was.

The principle not being in question, the point I have to determine is whether the deputy lieutenants, acting under s. 23, are such a tribunal as is indicated in that statement by Willes J., and that, of course, is a question of construction of the statute.

My attention has been called to the history of this legislation. It has been pointed out that the lord lieutenant occupied the position of head of the military forces of the county, and that his powers are regulated by the statute 42 Geo. 3, c. 90. Under that statute he has power to give certificates in regard to a number of matters relating to military affairs, and his other functions are in relation to calling out the militia of the county, furnishing them with arms and with the necessary equipment, and determining the quota proportionate to different places. My attention is also called to the fact that in the year following that Act which regulated the duties of the lord lieutenant, there was passed the temporary Act 43 Geo. 3, c. 55, which is the prototype of the statute with which I am concerned to-day. That Act contained provisions very similar to the present Act, and under s. 10 of that Act it was lawful for His Majesty or the lord lieutenant to authorize any general officer or

(1) 14 C. B. (N. S.) 180, 190.

person or persons commissioned for such purpose, to survey and mark out any piece of ground wanted for the public service, and to treat and agree with the owner thereof for the possession or use thereof, and there were provisions for summoning a jury to assess compensation, on very much the same lines as the provisions of the Act of 1842. There was also in the same section a proviso which required the certificate of the lord lieutenant: "Provided always that no such piece of ground shall be so taken for the public service without the consent of the owner or owners thereof, unless the necessity for the same shall be first certified by the lord lieutenant, or two of the deputy lieutenants, or by one governor, or two deputy governors of the county, riding, stewartry, city or place in which such lands shall lie, or unless the enemy shall have actually invaded the United Kingdom at the time when such piece of ground shall be so taken." That Act was slightly amended by an Act in the following year (44 Geo. 3, c. 95), which empowered trustees and other persons under disability to contract, and also gave power to obtain immediate possession, and s. 10 of the amending Act corresponds to s. 23 of the Defence Act, 1842, which took the place of those earlier Acts.

It is said that it is a judicial function resting on the lord lieutenant, or two deputy lieutenants, to certify the necessity or expediency of the acquisition of the land. I appreciate that if it be not a judicial function, the procedure under this Act is such that the landowner is never in a position to raise objection to the taking of his land on the ground that it is neither necessary nor expedient, although he has full opportunity of being heard on the question of the sufficiency of the compensation. There is no opportunity to be heard such as would arise where, under a private Act of Parliament, lands are scheduled for compulsory purchase. In such a case notice would be given to the persons interested, and presumably they would have a locus standi to oppose the Bill. At the same time, the mere fact that opportunity to be heard is not given by the statute would not, I think, justify me in coming to a conclusion as to its

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meaning contrary to the reasonable meaning of the language employed. What I have to determine is whether the language employed in the statute is of such a character as to create something in the nature of a judicial tribunal out of the lord lieutenant or the deputy lieutenants. In this connection it may not be wholly irrelevant to remember the position of the lord lieutenant as the chief local military officer of the district, or to examine, as I have done, the earlier Acts, but the question must ultimately turn upon the language of the actual Act which is being construed.

It is to be observed that where there are clearly judicial functions to be performed under the Defence Act, 1842, the Act provides for their being performed by judicial officers. Under s. 19, it is two or more justices of the peace or three deputy lieutenants, one of whom must be a justice of the peace, that are required to act, and elaborate provisions are made for procedure and the administration of oaths and matters of that sort, the whole of which are absent from s. 23; on the contrary, s. 23 selects officials who are not judicial officers at all, but who have certain military functions, and who may be considered by Parliament to be well qualified to form a judgment as to the necessity or expediency of taking lands for military purposes. Further, s. 23 really creates two conditions precedent to the exercise of the compulsory powers, and links them together, and those two conditions precedent are the certificate of the lord lieutenant, or the deputy lieutenants, and the warrant authorizing the taking of the land under the hand of the Lord High Treasurer or the Commissioners of His Majesty's Treasury. Those two things are linked together, and the failure to secure either the certificate or the warrant results in the War Office being unable to acquire the land compulsorily.

I think that there are two indications, therefore, as to the nature and effect of s. 23: first, the absence of any provision that would be expected in regard to a judicial proceeding, coupled with the presence of those provisions in those sections where judicial proceedings are clearly contemplated; and secondly, the linking up of the certificate of the lord

lieutenant or the deputy lieutenants with the warrant of the Treasury; and I doubt whether the boldest advocate would suggest that this warrant was issued by the Treasury as a judicial body, and could not be issued until the parties interested in the land had been heard upon the propriety of its issue.

There is a third matter, which it seems to me cannot be ignored: the question of necessity or expediency must, in many cases, be largely a question of policy, and it is difficult to suppose that it was ever the intention of the Legislature that a question of policy, possibly vital to the defence of the kingdom, should be debated before a tribunal at the instance of an individual whose land the State sought to acquire in the general interest and for the protection of the State. That, of course, is not an element which would affect the mind if the section was plainly couched in language setting up a judicial tribunal, but when I am asked to construe language which is not plainly intended to effect this, that does seem to me to be an element which may fairly and properly affect the mind in coming to a conclusion as to the real meaning of the phrase employed.

I come, therefore, to the conclusion that the lord lieutenant or the deputy lieutenants under s. 23 have placed upon them not a judicial function but an executive or administrative function, intended to secure that the powers of this Act are not recklessly exercised; that for this purpose some responsible official not unconnected with military matters and familiar with the locality has to be reasonably satisfied by the evidence that the War Office may put before him, that the case is one where necessity or expediency requires the taking of the land; and that the owner of the land has got nothing to do with it at all. The certificate required from the lord lieutenant or deputy lieutenants is in the same category as the warrant of the Treasury Commissioners. The certificate and warrant afford two precautions to secure, first, that the compulsory powers are not recklessly exercised, and, secondly, that they are not exercised without due regard to financial considerations. I think, therefore, that the plaintiff's point upon the invalidity of the certificate fails.

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He makes one other point. He says that on the true construction of s. 19 of the Act there was no power to summon a jury to assess compensation, unless first of all the Crown had been put into possession of the land, and that under the Act of 1919 the arbitration proceedings take the place of the proceedings before the jury; and he contends, therefore, that inasmuch as the Crown has not in fact been put into possession of the land, there is no jurisdiction to refer the matter to arbitration at this stage. I think the answer to that point is twofold. First, that on the true construction of s. 19 of the Act of 1842, there is in fact power to summon a jury, whether or not the Crown has been put into possession of the land; but, secondly, that even if that is wrong, ss. 1 and 7 of the Act of 1919, to which I have already referred, make it plain that the provision as to arbitration applies to every case where compulsory powers are being exercised and the compensation has to be assessed, and that if there is any inconsistency between the Act of 1919 and the earlier Act, the provisions of the Act of 1919 prevail. I think, therefore, that the second point fails equally with the first, and that in those circumstances I have no course but to refuse the application.

Solicitors: *Maxwell, Batley & Co., for Simpson, Curtis, Dixon & Burrill, Leeds; Treasury Solicitor; Trower, Still & Keeling.*

H. C. G.

In re BOWER WILLIAMS.

Ex parte TRUSTEE.

[463 of 1926.]

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C. A. 1927 *Jan.* 21.

Bankruptcy—Settlement—Property accruing to Settlor "after marriage in right of his wife"—Wife's Intestacy—Property devolving on Settlor jure mariti—Settlement on Child—Subsequent Bankruptcy of Settlor—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 42.

Sect. 42 of the Bankruptcy Act, 1914, provides that with certain exceptions any settlement of property shall, if the settlor becomes bankrupt within two years after the date thereof, be void against the trustee in the bankruptcy.

One of the exceptions is "a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife."

A husband and wife were married in 1913. In 1925 the wife died intestate, and certain company shares, her separate property, devolved on the husband jure mariti.

The husband completed his legal title by taking out administration, and then settled the shares on certain trusts for the benefit of his daughter and himself. Ten months later the husband became bankrupt.

Held (by Astbury J. and the Court of Appeal), that the shares had "accrued to the husband after marriage in right of his wife" within the meaning of the exception in s. 42, and therefore the settlement quoad the daughter's interest thereunder was valid against the trustee in the bankruptcy, though the husband's own interest passed to the trustee.

Smart v. *Tranter* (1890) 43 Ch. D. 587 followed.

In re Lambert's Estate (1888) 39 Ch. D. 626 approved.

MOTION.

On May 20, 1913, Bower Williams married Florence Ling. On March 30, 1925, the wife died intestate, and on May 9 the husband took out administration to her estate.

The wife's personal property to which the husband became entitled on her intestacy included sixty shares of 20*l.* each in a private company registered as "W. Ling, Limited." These shares were worth 3000*l.*

By a voluntary settlement of June 4, 1925, made between the husband of the one part and the husband and two other trustees of the other part, after reciting that the husband was desirous of irrevocably settling the sixty shares for the maintenance, education and benefit of his daughter Winifred,

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but as the shares were only transferable to executors, he was unable to transfer them into the names of the trustees. It was witnessed that, in consideration of the husband's natural love and affection for his daughter, the husband thereby covenanted with the trustees to stand possessed of the sixty shares and the investments representing the same (thereinafter called "the trust premises") and the income thereof in trust that the husband his executors or administrators would during the joint lives of himself and his daughter pay the trustees out of the income the yearly sum of 200*l.* (less income tax) to be held by them upon the trusts thereinafter declared and should retain the balance of the income for his own benefit And after the death of the husband or the daughter would stand possessed of the trust premises and the income thereof in trust for the survivor absolutely, but in the daughter's case, on her attaining twenty-one or marrying.

The yearly sum of 200*l.* was to be applied for the daughter's maintenance, education or benefit until her majority or marriage, any surplus to be accumulated as capital of the trust premises, and after her majority or marriage the said yearly sum was to be paid to her for life. If she did not survive the husband, but died an infant spinster, the trustees were to hold the trust premises for the husband his executors and administrators as part of his personal estate. If the daughter embraced the Roman Catholic faith the trusts were to take effect as though she were then dead.

On April 15, 1926, a receiving order and order of adjudication in bankruptcy were made against the husband, and on April 29 a trustee was appointed.

On July 10, 1926, the trustee in bankruptcy issued a notice of motion against the settlement trustees for a declaration that the voluntary settlement was void against him under s. 42 of the Bankruptcy Act, 1914.

Sect. 42 provides that with certain exceptions any settlement of property shall, if the settlor becomes bankrupt within two years after the date thereof, be void against the trustee in the bankruptcy.

One of the exceptions is "a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife."

The motion was heard before Astbury J. on November 15, 1926.

Tindale Davis for the husband's trustee in bankruptcy. These shares were choses in action belonging to the wife as her separate property. The husband could not have claimed them in the wife's right during the coverture, but on her intestacy they devolved on him jure mariti, and did not accrue to him in his deceased's wife's right at all within the meaning of the exception.

The exception first occurs in the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 91. It is then reproduced in the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 47, which came into operation from and immediately after December 31, 1883, but (s. 152) did not affect the provisions of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75).

Now at common law the wife's chattels personal in possession vested in the husband "on" not "after" the marriage, so that the exception presumably pointed to her choses in action reduced into possession during the coverture. Over her separate estate the husband had no rights at all. No doubt if she died intestate he took her personal property, including choses in action jure mariti, but surely they did not accrue to him in right of his wife within those old sections, which were obviously dealing with accruer during the coverture.

On January 1, 1915, when the Bankruptcy Act, 1914, came into operation there must have been many couples living who were married before January 1, 1883, when the Married Women's Property Act, 1882, came into operation, so that the reproduction of the same exception in s. 42 was quite appropriate.

As time goes on however the cases to which the exception applies will be fewer and fewer, and the exception will ultimately become nugatory. But that is not a reason for enlarging the meaning of these old words so as to include a case to which they were never intended to apply.

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F. Whinney for the settlement trustees. I cannot support the settlement as far as the husband's beneficial interest is concerned, but, as regards the daughter's interest, it is within the exception.

There is no authority on the meaning of the words "accrued to the settlor after marriage in right of his wife" in this exception, but prima facie they would include property, separate or otherwise, devolving on the husband jure mariti on his wife's intestacy. The beneficial interest in that property devolved on him at once simply and solely because the deceased lady had been his wife, and administration was only necessary to get in the legal title: *Cooper* v. *Macdonald* (1); *In re Lambert's Estate* (2); *Smart* v. *Tranter* (3); *Surman* v. *Wharton.* (4)

Tindale Davis in reply. Those cases do not touch the present point. The only question is whether the words "accrued to the settlor after marriage in right of his wife," as used in 1869, 1883 and 1914, can possibly have been intended to include property devolving on the husband jure mariti on or after the termination of the coverture.

ASTBURY J. [after stating the facts:] The question lies in a small compass—namely, whether this settlement was "a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife." The trustee in bankruptcy admits that the settlement was partly in favour of the daughter, but contends that the property did not "accrue to the settlor after marriage in right of his wife." He admits that on the wife's death on March 30, 1925, about two months before the settlement, the settlor became entitled to the beneficial interest in the shares jure mariti and completed his legal title by taking out administration on May 9.

Now whatever else the exception in s. 42 was intended to cover I am of opinion that this was a settlement made

(1) (1877) 7 Ch. D. 288, 296.
(2) 39 Ch. D. 626, 633.
(3) 43 Ch. D. 587, 592.
(4) [1891] 1 Q. B. 491.

by the settlor ten months before his bankruptcy of property that had accrued to him after marriage in right of his wife.

The trustee contends that property devolving on the settlor on his wife's intestacy did not accrue to him after marriage in right of his wife, but only in his own right jure mariti.

It is however impossible to construe the section in this way. The property no doubt accrued to the settlor jure mariti, but it was his deceased wife's chose in action that he was enforcing. That was an accruer of property in right of his wife within the exception.

There will be a declaration that the daughter's interest under the settlement does not pass to the trustee, but the settlor's interest does so pass. Costs of both parties out of assets.

G. R. A.

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The trustee in bankruptcy appealed. The appeal was heard on January 21, 1927.

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Tindale Davis for the appellant. In this case the wife was a member of the company and the shares in question stood in her maiden name at the time of her death. There is no question that the settlement comes within s. 42. As a matter of history that section, apart from the omission of the word "trader," is identical in terms with s. 91 of the Bankruptcy Act, 1869. It is submitted that the property acquired by the husband on the death of his wife intestate was acquired by him, not jure mariti, but as administrator of his wife's estate. The words "in right of his wife" in the section are only applicable to cases where the property was acquired by the wife before the Married Women's Property Act, 1882. The effect of s. 1, sub-s. 1, of that Act is thus stated in Williams on Executors, 11th ed., p. 529n.: "This enactment does not affect the devolution of the wife's property but only the 'jus mariti,' and it would seem, therefore, that, although under each of the above-mentioned sections (2 and 5) the married woman is entitled to have and to hold the property as her separate property, and to dispose of it 'in manner aforesaid,' i.e., 'as if she were a feme sole' (s. 1 (1)), the statute only means that she is to

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have the legal estate in the property, and that, therefore, if she dies without having aliened or disposed of it by will, her husband will have no right to it 'jure mariti,' because it never was his, yet he will still have the right (continued to him by the Statute of Frauds notwithstanding the Statute of Distributions) to administration and enjoyment of his wife's assets." I adopt that statement as part of my argument: see also Ibid., pp. 640, 651. In Lush on Husband and Wife, 3rd ed., p. 66, it is stated that "if the husband survived the wife he was entitled to her choses in action (not yet reduced into possession) as part of her estate, by virtue, not of the jus mariti, but of his right to administer to her effects." I attach great importance to that passage.

By the Act of 1882 the husband, during his wife's life, has no legal or equitable right to her choses in action. On her death he only becomes entitled to them as administrator. As administrator he is liable for the wife's obligations: *Surman* v. *Wharton*. (1)

When the husband in this case took out administration to his wife's estate he was entitled to enjoy the property, not jure mariti, but because he was administrator.

In re Lambert's Estate (2) and *Smart* v. *Tranter* (3) are distinguishable. They had reference to matters arising before the Act of 1882.

[LAWRENCE L.J. referred to *Drew* v. *Long*. (4)]

Cooper v. *Macdonald* (5) does not carry the matter any further.

The words "in right of his wife" in s. 42 are, it is submitted, used with reference to the lifetime of the wife. I do not suggest that the Married Women's Property Act, 1882, has altered the devolution of the undisposed of property of the wife, but that it has altered the character in which it devolves: see ss. 1, sub-s. 1, 5.

[He also referred to Macqueen on Husband and Wife, 4th ed., pp. 155, 156.]

(1) [1891] 1 Q. B. 491.
(2) 39 Ch. D. 626.
(3) 43 Ch. D. 587.
(4) (1853) 22 L. J. (Ch.) 717.
(5) 7 Ch. D. 288.

F. Whinney for the trustees of the settlement was not called upon to argue.

LORD HANWORTH M.R. This is an appeal from a judgment of Astbury J., sitting in bankruptcy, dated November 15, 1926, in which he decided the point raised by the trustee in bankruptcy in favour of the respondents.

The appeal is by the trustee in bankruptcy, and the respondents are the trustees of the settlement, the bankrupt being one of them.

The bankrupt married his wife on May 20, 1913. On March 30, 1925, she died intestate. On May 9, 1925, the husband took out letters of administration to her estate. On June 4, 1925, the bankrupt made a voluntary settlement, the nature of which was this: there was a daughter of the marriage, and part of the property of the wife consisted of a certain number of shares in a private company, the articles of which contained a clause restricting the transfer of shares, except to those who were members of the wife's family, these shares having come to the wife from her father. Owing to this difficulty of transfer, the husband, having become possessed of these shares, covenanted with the trustees of the settlement to hold them upon trust to pay to the trustees out of the income for the benefit of the daughter during her life the yearly sum of 200*l.*, the balance to be retained by the bankrupt, and the corpus to be held for the survivor of the husband and the daughter. Notice of this settlement was given to the company in July, 1925. Unfortunately the husband got into difficulties, and on April 15, 1926, a receiving order was made against him, and the same day he was adjudicated bankrupt.

Sect. 42 of the Bankruptcy Act, 1914, which is in pari materia and almost in identical terms with s. 91 of the Bankruptcy Act, 1869, provides, by sub-s. 1, that "Any settlement of property, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or

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children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy," subject to certain provisions which I need not recount.

Now the trustee in bankruptcy says that the bankrupt has made a settlement, and that he became bankrupt within two years from its date, and hence that it is void as against him. No question arises as to the interest taken by the bankrupt under the settlement, but what is said is that the settlement, so far as the daughter is concerned, is equally void under the section. The answer of the trustees of the settlement is that the operation of the section is excluded in the case of the daughter, because the section excepts settlements made "on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife," and they say that this property came to the bankrupt only in right of his wife, and that it is a settlement for the child of this marriage alone. To that the trustee in bankruptcy replies that since the Married Women's Property Act, 1882, although the husband on the wife's intestacy becomes administrator of the wife's estate, yet so far as he takes anything, he does not take it in right of his wife, and that under the Act of 1882 the property of a married woman is held by her completely free from all rights of the husband, which formerly accrued to him jure mariti.

The question, therefore, is whether the property settled is property which accrued to the husband after marriage in right of his wife within the exception mentioned in s. 42. There is no question as to the settlement being on or for a child of the settlor, or of the property accruing to the husband after the marriage, so that in effect we have only to construe the meaning of the five words, "in right of his wife."

Mr. Tindale Davis, in the course of an interesting argument, said that those words were only retained in the Act to meet the case where there had been a marriage before the passing of the Married Women's Property Act, 1882, and that in all

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cases where that Act applied there was no scope for the operation of those words of the section. It becomes, therefore, necessary to see what was and is the position of the husband. It appears to me that the point raised has been decided by a case which is binding on this Court; but in deference to the argument which has been addressed to the Court, I will call attention to how the matter stands historically.

It appears that originally an administrator took beneficially such residue as fell into his hands. The Statute of Distributions altered the law as to administrators generally, and removed that loose privilege, and a doubt arose whether or not the right of the husband in respect of his wife's property was cut away if he acted as administrator of her estate. Consequently by the Statute of Frauds, s. 24, it was provided that neither the Statute of Distributions nor anything therein contained, "shall be construed to extend to the estates of feme-coverts that shall dye intestate, but that their husbands may demand and have administration of their rights credits and other personall estates and recover and enjoy the same as they might have done before the makeing of the said Act." That means that the husband, as administrator of his wife, took all the property he was entitled to take jure mariti, and he got the legal title by the grant of administration. But what was the relation of the husband to the wife's property which lay outside the hands of the wife when she died? I am reading from Lush on Husband and Wife, 3rd ed., p. 66, where the learned author states: "Marriage was only a qualified gift to the husband of the wife's choses in action. It depended upon himself whether he made them his absolute property or not. If he brought the outstanding fund under his own exclusive control and dominion, by obtaining payment or otherwise—if, as it was said, he 'reduced it into possession'—during the coverture, the wife's right was gone. But if he did not, her choses in action remained her property, and upon the husband's death in her lifetime she was entitled to them as against his legal personal representative. On the other hand, if the husband survived the

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wife he was entitled to her choses in action (not yet reduced into possession) as part of her estate, by virtue, not of the jus mariti, but of his right to administer to her effects."

Now here we have shares which are choses in action, and the husband would have to take out administration to get them into his hands. We have been referred to two cases in which the property was not reduced into possession during marriage, and which the wife held after the Married Women's Property Act, 1882.

In *In re Lambert's Estate* (1) Stirling J., after referring to the Statute of Frauds and the Statute of Distributions, said: "Accordingly the husband when living was absolutely entitled to be the administrator of his wife. After his death, however, there were cases in which the Ecclesiastical Court considered itself bound to grant administration to the next of kin of the wife. Nevertheless, in equity, the title of the husband prevailed, and the administrator of the wife was held to be a trustee for the legal personal representative of the husband." He then cited cases in support of that statement and continued: "The equitable interest of the husband vested on the death of the wife, and passed not merely to his legal personal representatives, but to his assignees in bankruptcy." Now what is the effect of that? It is said that though by the Statute of Frauds the husband is entitled to be administrator, yet what he takes he takes as administrator, that he does not take anything which reaches him jure mariti, as husband. It is said that that is how the situation has been completely altered since 1882, that the right of the husband now is no more than the statutory right to be administrator, and that that does not fulfil the words of s. 42, "in right of his wife."

In *Smart* v. *Tranter* (2) Lindley L.J. in a judgment which is binding upon us said: "It is clear that since the Statute of Frauds, if the husband takes out administration, he can get the reversionary choses in action of the wife; but if he does not, the Statute of Frauds does not in terms apply. That doubt was raised and solved very early in the case of

(1) 39 Ch. D. 626, 630. (2) 43 Ch. D. 587, 596.

Cart v. *Rees*, which is stated in the following terms by the Lord Chancellor Cowper when giving judgment in *Squib* v. *Wyn* (1): 'A wife died possessed of choses in action, and the husband survived, and died without taking out letters of administration to his wife, after which, the next of kin of the wife administered to her, and Lord Parker held, that the administrator to the wife was but a trustee for the executor of the husband, the right to the wife's choses in action being, by the Statute of Distributions, vested in the husband, as next of kin to the wife; and whereas there is a proviso in 29 Charles 2, saying, that the Statute of Distributions shall not extend to the estates of feme coverts that die intestate, but that their husbands may have administration of their personal estate, as before the making the Act, his Lordship said, this clause was made in favour of the husband, and not to his prejudice; so that it was intended by the Parliament, that the husband should be within the Statute of Distributions, so as to take the wife's choses in action, as to his benefit, but should not be within the same, as to his prejudice; and that this was not a new point, but had been settled, and upon very good reason; for were the construction to be otherwise, the husband of the wife intestate would be in a worse case than the next of kin, though ever so remote, which was not the intent of the statute.'" That shows very clearly that the relation of husband and wife secures that administration shall be granted to the husband, and if granted to a person other than the husband, that person would hold for the husband; because the beneficial interest in the wife's property vested in him on her death, though certain proceedings had to be gone through, because he was entitled to be treated as being in a higher position than next of kin for the reason that he was the husband. So here I think that the husband takes because he is the husband, not because he is the administrator. This, in my opinion, is made clear both by the judgment of Cotton L.J. and by that of Lindley L.J. A little further on in his judgment Lindley L.J. said: "There is now no doubt as regards the

(1) (1717) 1 P. Wms. 378, 381.

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choses in action of the wife not reduced into possession during the coverture, that if the husband survives he is beneficially entitled to them. If he takes out letters of administration he is entitled to them at law and in equity; but if he does not take out letters of administration the legal personal representative of the wife is the person to get them in, but, having got them in, holds them in trust for the husband. That appears to me to be the law as settled ever since the case in Peere Williams."

For these reasons, and because this case is binding on this Court, it appears to me that we must hold that the beneficial interest in these shares accrued to the bankrupt in right of his wife, and therefore the settlement on the daughter remains good. The appeal therefore fails and must be dismissed.

SARGANT L.J. I am of the same opinion. The question is whether the settlement made by the bankrupt is void against the trustee in bankruptcy under s. 42 of the Bankruptcy Act, 1914. Under that settlement the daughter took 200*l.* a year for life. The rest of the income of the property was settled on the bankrupt for life and the corpus on the survivor of the husband and daughter. No practical question arises as to the beneficial interest of the bankrupt himself under the settlement for this would undoubtedly pass to his trustee in bankruptcy without any avoidance of the settlement. The sole practical question is as to the retention by the daughter of the beneficial interest given to her by the settlement. She was the daughter of the wife of the bankrupt, who was married to him on May 20, 1913, and died intestate on March 30, 1925, and the property settled consisted of shares in a private company, which belonged to the deceased wife and to which the bankrupt became entitled on her death.

The sole question is whether the property settled was property which had accrued to the husband "in right of his wife," and it is conceded that all the words of the exception in s. 42 are satisfied except those words. The judge in the Court below has decided that the property accrued to the

bankrupt in right of his wife, and, in my opinion, he was right in so deciding. It was argued against this view that the bankrupt did not take the property in right of his wife by virtue of his title as her husband, but because he had constituted himself administrator of her estate. In my opinion that argument is wrong, and is shown to be wrong by *Smart* v. *Tranter* (1) and *In re Lambert's Estate* (2), where it is recognized that on the death of the wife intestate the husband at once becomes entitled to the full beneficial interest in the choses in action of the wife, and that the process of taking out administration is only a process of reducing them into possession. It is only a method of completing his legal title, and has no bearing on any beneficial interest in the property. The beneficial title is the main thing we have to consider, but even if we have to regard the taking out of administration as an essential step, the two cases to which I have referred show that the right which the husband had to take out administration was because he was the husband of his deceased wife; and so the need to take that step does not prevent the husband from being entitled to the property in right of his wife.

Mr. Tindale Davis sought to limit the jus mariti to a right which the husband exercises during coverture, but, in my view, the term "jus mariti" also includes the right to take out letters of administration in order to get possession of her property. If, as I think, the husband, as husband, has a right to get the property of his wife, it is impossible to say that he does not get it "in right of his wife."

The appeal must be dismissed.

LAWRENCE L.J. The question is whether the property settled by this settlement does not fall within the exception in s. 42 of the Bankruptcy Act, 1914, as property which has accrued to the bankrupt after marriage "in right of his wife."

The property consists of shares in a limited company, which stood in the name of the bankrupt's wife at her death.

(1) 43 Ch. D. 587. (2) 39 Ch. D. 626.

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It is not disputed that the beneficial interest in these shares vested in the bankrupt on the death of his wife, but it was strenuously contended that as the husband took no interest in the shares during his wife's lifetime they did not accrue to him in right of his wife. It is said that the words "in right of his wife" in the exception in s. 42 only apply to property acquired by the husband during the coverture and are not applicable to property acquired by the husband after the determination of the coverture and in respect of which property it is necessary to take out letters of administration to the wife's estate. There is no authority which binds the Court to confine the language of s. 42 in that way. The property accrued to the bankrupt solely by virtue of his position as husband. Further the beneficial interest would have vested in him on his wife's death whether letters of administration to her estate had been taken out by him or by some other person. In my opinion the shares were property which accrued to him "in right of his wife" within the ordinary meaning of that expression.

I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Osborn & Osborn; Teff & Teff.*

W. I. C.

In re ELLWOOD.

[6 of 1926.]

ASTBURY and CLAUSON JJ.

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Bankruptcy—Administration—Preferential Payments—"All parochial or other local rates"—Drainage Rate—"Ejusdem generis"—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 33, *sub-s.* 1 (*a*)—*Land Drainage Act,* 1861 (24 & 25 *Vict. c.* 133)—*Land Drainage Act,* 1918 (8 & 9 *Geo.* 5, *c.* 17).

A land drainage rate levied by the River Dee Drainage Board (a Board constituted under the provisions of the Land Drainage Acts, 1861 and 1918) upon an occupier of land within the district of the Board, and having become due and payable within twelve months next before the making of a receiving order against him and still due at that date, is a local rate entitled to preferential payment within the meaning of s. 33, sub-s. 1 (*a*), of the Bankruptcy Act, 1914.

APPEAL from County Court at Chester.

The relevant facts, which were not in dispute, were as follows: The River Dee Drainage Board was established by an Order in Council, No. 641 of 1922, and confirmed by the Minister of Agriculture and Fisheries under the provisions of the Land Drainage Acts, 1861 and 1918. The separate drainage district which came under the jurisdiction of the Board, the boundaries of which were extended in 1925, extended over a considerable area and was divided into a series of sub-areas for rating purposes. In one of those areas, known as H 3, comprising 3000 acres, there was included a farm of about 97 acres belonging to the bankrupt.

On September 12, 1925, the Board, in exercise of its statutory powers, levied a rate of 9*l.* 15*s.* 6*d.* upon the bankrupt in respect of his farm, the rate being based upon acreage at the rate of two shillings per acre: and within twelve months of that date—namely, on May 21, 1926—a receiving order was made against the bankrupt, which was followed by adjudication. The rate became due and payable within twelve months next before the date of the receiving order, and was still due at that date. The relevant words of s. 33, sub-s. 1 (*a*), are: "In the distribution of the property of a bankrupt there shall be paid in priority to all other debts: (*a*) All parochial or other local rates due from the bankrupt at the date of the receiving order, and having

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become due and payable within twelve months next before that time." By s. 4 of the Land Drainage Act, 1918, the powers of the Board included powers of levying drainage rates on the basis of acreage or on the basis of annual value of the lands liable to be rated. And an order made under the Act might provide for differential rating of part of any drainage district and for total or partial exemption of buildings, railways, canals, inland navigation or any other special class of land within the district or area.

By the Order, under which the Board was established, for the purpose of the election of the Board and of rating, the district was divided into eight areas: sixteen members of the Board were "elected members," who had to be qualified in respect of lands owned or occupied within the respective areas of the district, and five members were "appointed members," appointed by County Councils and the River Dee Conservancy Board and the City of Chester Corporation; and the Board had the option of levying the rate on the basis of acreage or of annual value.

This was an appeal by the Board from the judgment of the county court judge, whereby it was declared that the claim of the Board for the rate against the estate of the bankrupt then vested in the official receiver was not entitled to preference within s. 33, sub-s. 1 (*a*), of the Bankruptcy Act, 1914.

Montgomery K.C. and *John Grace* for the appellant. The ejusdem generis rule of construction is not applicable to this case. Where the expression consists of two limbs, as it does here, it is impossible to apply the rule. A parochial rate is a local rate applying to a parish. There are other local rates which do not apply to a parish; instances of which are a district rate and a drainage rate. Even assuming the ejusdem generis rule to be applicable, although it was held by North J. in *Richards* v. *Kidderminster Overseers* (1) that a general district rate was not a parochial rate, it was not disputed in *In re Mannesmann Tube Co.* (2) that a district rate was

(1) [1896] 2 Ch. 212, 217. (2) [1901] 2 Ch. 93.

in the same position as a poor rate. The words must be given their ordinary meaning, unless there is something to show that the ordinary meaning is not the true one: per Rigby L.J. in *Anderson* v. *Anderson* (1) and *S.S. Magnhild* v. *McIntyre Brothers & Co.* (2) Therefore a parochial rate is a local rate and a drainage rate is a local rate. The first limb of the sentence consisting of parochial local rates, the other local rates referred to in the second limb—namely, local rates other than parochial—must include the drainage rate in question. Granted the rates referred to in s. 33, sub-s. 1 (*a*), are rates levied in respect of some area (whether a parish or some other area, subject to local government, e.g., a County Council area), it is immaterial whether the area in respect of which the rate is levied is a local government area. It was assumed in *In re Mannesmann Tube Co.* (3), that a water rate, even though levied by a water company and not by a local government authority, was, nevertheless, a local rate; nor in *In re An Arranging Debtor* (4) was it disputed that an ordinary contract water rate was a local rate entitled to preferential payment, and in the Act dealt with in that case there were provisions which extended to a special area beyond the local government area; but in fact the Court of Sewers or a Drainage Board is a local government body, whose history is traceable from early times and has a defined local government area of its own which has been altered from time to time. There is one case in which the ejusdem generis rule seems to have been applied to a two limbed case: *Inland Revenue Commissioners* v. *Southend-on-Sea Estates Co.* (5), where there was a right to terminate a lease, if the lessors wished to resume possession for "building or other purposes," and the words "other purposes" were held to mean purposes of the same kind: it was argued that if the words did not mean that, the Act might just as well have said "resume possession for any purpose": but some meaning had to be given to the words "other purposes," and therefore

(1) [1895] 1 Q. B. 749, 755.
(2) [1920] 3 K. B. 321.
(3) [1901] 2 Ch. 93.
(4) [1921] 2 I. R. 1.
(5) [1915] A. C. 428, 431.

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the ejusdem generis rule was applied. It may be that the genus in the first limb was estate development of some kind other than agricultural, and it may have been thought that "building" would not cover making a road through the estate; hence the propriety of adding the words "other purposes."

[ASTBURY J. I doubt whether that case was really an instance of the application of the rule of ejusdem generis.]

Here the phrase must have been intended by the Legislature to cover something more than all local rates. The meaning of the phrase is not "parochial rates" on the one hand and "other local rates" on the other; it is "parochial local rates or other local rates," or in other words "local rates, parochial or other." The second limb includes rates levied by an urban or district authority or a County Council or a Drainage Board.

Hansell for the respondent. The onus lies upon the appellants to show that they come within the privileged class of creditors specified in s. 33. In order to properly construe the material words of the section, the ejusdem generis rule of construction ought to be applied. In that case, the other local rates referred to in the section must be of the same character as parochial rates. For the purpose of considering whether the rate in question is a local rate imposed by a local authority, it is important to consider the constitution of the rating authority. The Drainage Board which has power to levy the rate is not a body elected by the persons liable to pay the rate. The Board was constituted under an Order in Council under the provisions of the Land Drainage Acts, 1861 and 1918. The parochial rate must be levied on the annual value, but here there is an alternative method for ascertaining the amount of the rate—namely, by the acreage. The demand note shows that the rate is levied on acreage. By the Order in Council a differentiation is made between different sub-areas of the total area under the jurisdiction of the Board, a differentiation in levying the rate in the area between one sub-area and another. That constitutes an essential difference between

a parochial rate and the drainage rate in question, because a parochial rate is a rate levied upon the basis of equality, the measure of which is the annual value, and there is no differentiation made between parochial rates. By s. 5 of the Land Drainage Act, 1918, a distinction is drawn between a drainage authority and a local authority. The drainage authority is referred to in s. 6 and throughout the Act.

In construing s. 33 of the Bankruptcy Act, 1914, the ejusdem generis rule ought to be applied. First, the genus in the first limb of the expression is rates restricted to parochial rates, and in the second limb there is apparently in some sense a wider class of rates—namely, " other local rates " ; but, according to the rule of construction laid down in Maxwell on the Interpretation of Statutes, 6th ed., p. 583, where there are limited words followed by wider words, the meaning of the latter words must be restricted by the preceding words, unless there is something to show that a wider meaning is intended. There is nothing in the section to show any such intention. Therefore, the words " other local rates " mean rates different from but analogous to parochial rates. The section is dealing with two kinds of rates and two kinds only—namely, parochial and other like rates. Here the drainage rate is differentiated from a parochial rate in that the Board has an option as to the basis on which it will levy its rate, an option which the poor law authority, is without. Secondly, the Board is not a local authority, and is differentiated from it by the Act of 1918 ; and thirdly, the Board can differentiate between different portions of its area. The test to apply, in ascertaining whether a rate which is not a parochial rate falls within the class of " parochial or other local rates," is that of equality of treatment ; here the rate may be levied on the annual value or upon the acreage ; the second test is the power to differentiate between different portions of the rateable area. But assuming this drainage rate to be a rate, it is not a " local " rate within the meaning of the section. A local rate means a rate imposed by one of the bodies that are commonly known as local government authorities and which are elected bodies, elected by the

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persons liable to pay the imposition. The Board here is appointed by the Ministry of Agriculture and Fisheries under the power in the Act. In the first instance it is a Board nominated by the Order; with regard to subsequent Boards, sixteen members are elected, but they must possess a certain holding or qualification within the area, and certain other bodies have power to elect. Throughout the Act of 1918 a distinction is drawn between the drainage authority or the Board and the local authority. *In re Mannesmann Tube Co.* (1) is of no assistance in this case. It did not decide that even a water rate is necessarily a rate. The Irish case turned upon words which were quite different, "all local rates."

ASTBURY J. This is an appeal from a decision of the learned County Court judge at Chester dismissing a motion by the River Dee Drainage Board in which they asked for a declaration that a sum of 9*l.* 15*s.* 6*d.*, being a rate levied by them upon the bankrupt, was a debt within s. 33, sub-s. 1 (*a*), of the Bankruptcy Act, 1914, and ought to be paid in preference to the bankrupt's ordinary debts.

The appellants are an old local authority exercising statutory powers in the district. They levied a rate on September 12, 1925, in respect of the bankrupt's property, consisting of 97 acres, within one of their districts. On May 21, 1926, a receiving order was made. The only words of the section, stating the preferential debts, which are relevant are the following: "All parochial or other local rates due from the bankrupt at the date of the receiving order, and having become due and payable within twelve months next before that time." It is not contested that this was a rate due from the bankrupt at the date of the receiving order and that it became due and payable within twelve months next before that time. The only question is whether this drainage rate is an "other local rate" within the meaning of this section. The learned judge in an elaborate judgment has given his reasons for thinking that this is not the case; and I think

(1) [1901] 2 Ch. 93.

that the real effect of his judgment is that the ejusdem generis rule should be applied to the words of the section, and that, so applying the rule, this drainage rate is excluded.

The matter, in my opinion, lies within an extremely small compass. I do not propose to discuss the various reasons stated by the learned judge in the Court below for applying the ejusdem generis rule. Some of those reasons may be right in themselves, although some I think are not; but they are really not relevant to the matter which, in my opinion, has now to be decided. The words are "All parochial or other local rates." It is not denied that this drainage rate is a local rate and that it has been levied by an authority having statutory power to levy such rates in this particular district, but what is contended is that, in some way or another, which I confess I do not understand, the words "other local rates" must be construed ejusdem generis with "parochial rates" in such a manner as to include certain local rates other than parochial rates and yet to exclude other local rates. It is difficult to apply the ejusdem generis rule to a sentence or expression having only two limbs. If there is a category followed by general words, it is the common experience of us all that the general words may be construed ejusdem generis with the particular category preceding them. In *Anderson* v. *Anderson* (1) Rigby L.J. said: "The doctrine known as that of ejusdem generis has, I think, frequently led to wrong conclusions on the construction of instruments. I do not believe that the principles as generally laid down by great judges were ever in doubt, but over and over again those principles have been misunderstood, so that words in themselves plain have been construed as bearing a meaning which they have not, and which ought not to have been ascribed to them. In modern times I think greater care has been taken in the application of the doctrine; but the doctrine itself as laid down by great judges from time to time has never been varied: it has been one doctrine throughout. The main principle upon which you must proceed is, to give to all the words their common

(1) [1895] 1 Q. B. 749, 755.

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meaning: you are not justified in taking away from them their common meaning, unless you can find something reasonably plain upon the face of the document itself to show that they are not used with that meaning, and the mere fact that general words follow specific words is certainly not enough." Then a little lower down, quoting from other authorities, the Lord Justice says: "You must give the words which you find in the instrument their general meaning, unless you can see with reasonable plainness that that was not the intention." Mr. Hansell, in arguing on behalf of the respondent, has attempted to bring the case within some such limitation as ejusdem generis by pointing out that under the Land Drainage Act, 1918, under which the Board at present operates, the Board may differentiate between portions of an area within its jurisdiction, and does not necessarily apply equality of treatment with regard to the whole of its rates. He says, and quite truly, that that is something quite different from the necessary character, qua equality, of a parochial rate. Further, he points out that in the same statute there are expressions showing that the Drainage Board is for certain purposes differentiated from the local authority; where, for instance, the local authority may be empowered by the Board of Trade to contribute to the expenses of the Drainage Board. That is perfectly true, but I cannot for that reason bring myself to think that the expression "other local rates" in this statute can be confined or was intended to be confined to local rates, having all the characteristics of parochial rates. The statute does not say so. There is no category, if I may use the term, followed by general words; there is a statement that "all parochial or other local rates" shall receive preferential payment; and I cannot understand how there can be a local rate which is not parochial ejusdem generis with a parochial rate in all respects, nor do I think this statute says so. It is quite true, as Mr. Hansell has pointed out and as Clauson J. has pointed out during the argument, that if it is impossible to construe this sentence ejusdem generis, it may very well be that the Legislature has quite unnecessarily put in the

word "parochial," and that it would have been sufficient if it had said "all local rates" shall receive preferential payment. There may be tautology or there may be other reasons which need not be discussed; the only matter that this Court has to decide is whether this drainage rate is a local rate, which is not included in the general expression "other local rates." Mr. Hansell has referred to a passage in Maxwell on the Interpretation of Statutes, 6th ed., p. 583. I do not think it helps him. It puts the ejusdem generis argument rather higher than it has been put in certain authorities, but it is really only dealing with cases where particular or specified words are followed by general words which can fairly and within the apparent intention of the document be construed in the same general sense. Lord Selborne in *Attorney-General of Ontario* v. *Mercer* (1) says this:—and I think the passage is rather more against Mr. Hansell than the passage he read from Maxwell—"It is a sound maxim of law, that every word ought, prima facie, to be construed in its primary and natural sense, unless a secondary or more limited sense is required by the subject or the context." Now "other local rates," construed in the primary and natural sense of those words, obviously include the rate in question, and I cannot, speaking for myself, find that any secondary or more limited sense of the expression "other local rates" is required by any context. I may refer to one further explanation of ejusdem generis which I will read from Beal's Cardinal Rules of Legal Interpretation, 3rd ed., p. 355, which seems to me to be accurate, as far as I can judge from the authorities that have been cited, and that I have looked at, he says: "General words in a statute are prima facie to be taken in their usual sense. General words following specific words in a statute are prima facie to be taken in their general sense, unless the reasonable interpretation of the statute requires them to be used in a sense limited to things ejusdem generis with those which have been specifically mentioned before," and then he says this, which I think also is accurate according to the

(1) (1883) 8 App. Cas. 767, 778.

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authorities: "If the particular words"—and here there is only one—"exhaust the whole genus, the general words must refer to some larger genus." Here the words "parochial rates" exhaust the class, parochial rates, and it seems to be obvious that the Legislature intended something other and different from parochial rates to be included in this preferential section. The words "other local rates" plainly cover the present case, unless under the rules that I have read they can be construed in some other than their natural and ordinary sense, and I see no justification or reason in the statute for doing anything of the kind. In fact my own view is that the statute pointedly refers to an intention to include in the preferential class rates which are obviously not and cannot be parochial.

For these reasons I think that this appeal succeeds and that the judgment of the learned County Court judge must be reversed.

CLAUSON J. I agree. The drainage rate which is in question here seems to me quite plainly to be a rate and to be a local rate, and, if I am at liberty to read the words in question in their primary and natural sense, it seems to follow that this rate is included in the expression "all parochial or other local rates." The difficulty, however, arises that, if that be so, it would seem that the words "parochial or other" in the statute are superfluous and that the same result might be reached by the Legislature using the expression "all local rates" instead of the expression which the Legislature has used, "all parochial or other local rates." Either the words "parochial or other" limit the words "local rates" or they do not. In the latter case the Legislature has used superfluous words. But assuming for the moment that they do limit the words "local rates," the question which arises is, what is the limitation? It is suggested that the limitation can be discovered by applying the rule of "ejusdem generis." When several particulars are enumerated and general words follow, it is often not difficult to ascertain the category or genus—whichever term is used—which is indicated

by the general words, by finding some characteristic which is common to each of the enumerated particulars and coming to the conclusion that the category or genus is a category or genus of things which have that common characteristic. It is obvious that when only one particular is mentioned before the general words, the task of ascertaining the category or genus is, to say the least, a very difficult one. Mr. Hansell invites us to say that the words "parochial or other" have this meaning, that they limit the expression in the statute to the meaning, "such local rates as are parochial rates or similar to parochial rates." When he is asked to define the similarity, his answer, I think, comes to this, that the expression I have just referred to means such local rates as fall equally on all the payees throughout the area in proportion to the value of their properties. That is a characteristic, so he tells us, and I accept it for this purpose, of parochial rates, and any rate with that characteristic comes within the term "parochial or other rates," while a rate without that characteristic will not fall within the meaning of the expression. I cannot satisfy myself that the criterion which he asks us to apply to fix the category is a satisfactory one. I do not myself believe that in using the expression which is used the Legislature had in mind or intended to place in a separate class rates which fall equally on all payees throughout the particular area in proportion to value. That being so, I am driven back to construe the words according to their primary and natural sense, notwithstanding that in doing so I am bound to give the clause a meaning which could have been expressed by a somewhat less number of words than the Legislature has in fact used. That however seems to me to be the only way in which this clause can be construed.

For these reasons I am in agreement with the judgment that my brother has pronounced.

Solicitors: *Bell, Brodrick & Gray, for Mason & Moore Dutton, Chester; Solicitor to the Board of Trade.*

H. C. H.

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Jan. 20, 21, 28; *Feb.* 2.

In re CHARTRES.

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[1926. C. 2175.]

Will—Class—Gift in futuro—Time for ascertaining Class—Rule of Convenience—Testamentary Power to appoint to Class A—Gift in Default to Class B—Release of Power.

A testator disposed of his income for twenty-one years from his decease, and after the expiration of that period gave two-fifths of his residue in trust for R.'s children or remoter issue as R. should by will appoint and in default of appointment in trust for all R.'s children who being sons should attain twenty-one or being daughters should attain that age or marry.

The testator died on March 11, 1905, so that the twenty-one years' period expired on March 11, 1926.

R. at present had one child only—namely, a son A.—who attained twenty-one on March 18, 1916.

On March 12, 1924, R. released his testamentary power.

On February 26, 1925, A. died, having by his will of February 13 appointed F. and R. executors and bequeathed his property to R.:—

Held, that R. having released his power, and A. having attained twenty-one within the twenty-one years' period, the class in default of appointment closed at the end of that period, in accordance with the ordinary rule of convenience, so that A.'s executors were entitled to the fund to the exclusion of any future born children of R.

Semble: If the power had not been released the class might have been kept open during R.'s life, or until release.

Observations on the so called rule of convenience.

Coleman v. *Seymour* (1749) 1 Ves. Sen. 209; *In re White's Trusts* (1860) John. 656, 659; *In re Stephens* [1904] 1 Ch. 322, 328; and *In re Emmet's Estate* (1880) 13 Ch. D. 484 discussed.

ORIGINATING SUMMONS.

By his will dated March 21, 1904, a testator, after appointing executors and trustees and bequeathing certain legacies and annuities devised and bequeathed his residuary, real and personal estate to his trustees upon trust for sale and conversion. He directed that for twenty-one years from his decease the income of the net proceeds should be applied in manner therein mentioned, including the payment of 150*l.* annuity to his daughter Harriette, which annuity was by clause 12 continued for her life if living at the expiration

of the twenty-one years. Another annuity and a life interest in the balance of income similarly continued to the testator's son Richard and the testator's wife had ceased by forfeiture and death respectively.

By clause 13 the testator from and after the expiration of the twenty-one years, but subject to the provisions of clause 12, gave and bequeathed the trust funds as to two-fifths thereof " In trust for the child or children or remoter issue of my said son Richard . . . ." if of the faith and belief therein mentioned " in such shares (if more than one) and in such manner as my said son shall by his last will appoint and in default of such appointment and so far as any such appointment shall not extend in trust for all the children of my said son Richard . . . . if of such faith and belief as aforesaid who being sons attain the age of 21 years or being daughters attain that age or marry."

By clause 14 the testator directed the remaining three-fifths to be held in trust for his daughter Harriette for life and after her death (and subject to any appointment in favour of her husband under a preceding clause) In trust for such of her children or remoter issue as she should by will appoint and in default of appointment In trust for all her children who being sons attained twenty-one or being daughters attained that age or married in equal shares as tenants in common, with the usual hotchpot provision, and if there were no son who attained twenty-one or no daughter who married, then upon the trusts of the other two-fifths or such of them as should then be subsisting and capable of taking effect with an immaterial gift over if there should be no child of Richard then entitled to those two-fifths under clause 13.

On March 11, 1905, the testator died, so that the twenty-one years' period expired on March 11, 1926. His estate was pure personalty. On January 15, 1909, the testator's wife died.

With the exception of a boy who predeceased the testator on December 16, 1898, aged six weeks, the testator's son, Richard, had one child only—namely, a son, Archibald, born March 18, 1895. Richard had for many years ceased to live with his wife.

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By a deed poll of March 12, 1924, Richard released his power of appointment over the two-fifths in clause 13, and by another deed poll of September 9, 1924, he released his power over the three-fifths in clause 14.

On August 29, 1924, Archibald mortgaged his interests under the will to the Legal and General Assurance Society, Ld.

On February 26, 1925, Archibald, who was of the requisite faith and belief, died, having by his will of February 13 appointed Farman and the testator's son, Richard, executors and trustees, and devised and bequeathed his residue to them upon trust for sale and conversion, the net proceeds after payment of debts, funeral and testamentary expenses to be held in trust for Richard.

The testator's daughter, Harriette, born October 29, 1872, was still a spinster.

On June 16, 1926, Archibald's executors issued this summons to determine :—

(1.) Whether upon the true construction of the testator's will and in the events that had happened they were now entitled (subject to the mortgage and to the prior interests under the will) to the two-fifths of the residue, or whether Richard's future children (if any) would be entitled to share.

(2.) Whether the remaining three-fifths would upon Harriette's death without issue accrue to the persons deriving title under Archibald or whether Richard's future children (if any) would be entitled to share.

Gavin Simonds K.C. and *Dighton Pollock* for Archibald's executors. As Archibald attained twenty-one within the twenty-one years' period, the class in default of appointment closed at the end of that period, whether the power of appointment to the larger class existed or not: Farwell on Powers, 3rd ed., pp. 534, 535; Hawkins on Wills, 3rd ed., pp. 86, 91, 96; Jarman on Wills, 6th ed., pp. 1647, 1705; Theobald on Wills, 7th ed., pp. 313, 314; *Carthew* v. *Enraght* (1); and as Archibald was then the only child, his executors take the whole two-fifths. As to the rule of convenience generally see Jarman on Wills, 6th ed., pp. 1664–1706.

(1) [1872] W. N. 121; 20 W. R. 743.

A doubt was raised in *In re White's Trusts* (1) whether the class ought not to be kept open during the existence of the power. But does the existence of the power really make any difference to the construction of the gift in default? In the case of an immediate gift subject to a power the rule applies, notwithstanding the power: *Coleman* v. *Seymour*. (2) Surely it must equally apply to a gift in futuro.

Suppose however, contrary to this view, that the class is kept open during the existence of the power, on the ground that there can be no distribution while the power exists. The present power was released before the twenty-one years expired, so that the trust in default arose on the expiration of that period. How can an expired power keep the class open during the life of a donee who has no life estate?

Stafford Crossman for the will trustees, representing Richard's unborn children. The rule of convenience, even if now a rule of construction, yields to a contrary intention: Hawkins on Wills, 3rd ed., p. 7. The rule is clearly stated in Theobald on Wills, 7th ed., pp. 306–310.

In this case the testator clearly intended to include all children born during Richard's life. He gave Richard a testamentary power not only to appoint to his own children, but also to their issue. This is a sufficient indication of his intention to exclude the rule.

Again, the rule must not be applied unless necessary: *In re Emmet's Estate*. (3) Now so long as Richard had his testamentary power, it would be impossible to distribute the fund, and there would be no necessity to close the class. The release of the power was a subsequent act, not in the testator's contemplation, and not affecting his intention as to the class he intended to take.

Coleman v. *Seymour* (2) is not really in point. There was an immediate gift to Jane's younger children, to be distributed in such shares as she thought fit, and in default of appointment equally. This was a mere power of selection. Lord Hardwicke L.C. held on the construction of the will that the

(1) John. 656, 659. (2) 1 Ves. Sen. 209.
(3) 13 Ch. D. 484, 488–490.

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testator meant the younger children in esse at his will and death, so that there was no necessity to resort to the rule at all.

In re Faux (1) is not of much assistance, but the class was in fact kept open till the life-tenants of both moieties died. The decision was followed without comment in *In re Paul's Settlement Trusts.* (2)

John L. Stone for Harriette. The ultimate gift of the three-fifths in clause 14 on the trusts of clause 13 indicates that the class under clause 13 must be kept open during Harriette's life.

Gavin Simonds K.C. in reply. Clause 14 affords no such indication. It is true that in *Coleman* v. *Seymour* (3) there was a mere power of selection. But the shares of the beneficiaries in default could be varied while the power existed. The point was very clearly put in the argument (4), and the text-books have always treated the case as an application of the rule.

Feb. 2. ASTBURY J. [after stating the facts:] The question is whether what has been described as a rule of convenience, for the purpose of ascertaining the class to take under a gift of the fund in order that the beneficiaries may know what their shares are and that the executors may distribute the fund, ought to be applied in the circumstances of the present case.

There can, of course, be little doubt that the testator intended the two-fifths of his residue to go to all Richard's children who being sons should attain twenty-one or being daughters should attain that age or marry, unless Richard, by exercising his testamentary power, gave the property to his children or remoter issue or some or one of them. In other words, there really can be no doubt that the testator intended that any child of Richard who should come into existence in his lifetime should take in default of appointment,

(1) [1915] W. N. 135; 84 L. J. (Ch.) 873.
(2) [1920] 1 Ch. 99, 107.
(3) 1 Ves. Sen. 209.
(4) 1 Ves. Sen. 210.

though Richard by exercising that power could distribute the two-fifths in the way I have mentioned; and the question I have to decide, and which in my judgment is an extremely difficult one, is whether this so called rule of convenience in the events that have happened entitles the personal representatives of Archibald who died after acquiring a vested interest subject to its being divested or altered in amount either by the exercise of the power or in default of appointment by other children being born to Richard is now, by reason of the rule, entitled to defeat the plain intention of the testator.

The principle of this rule is that the class to take is to be ascertained as soon as possible in order that the beneficiaries may know what their shares are and that the fund may be distributed. The rule is, of course, obviously convenient to those who take under it to the exclusion of others intended to benefit, but the irony of the rule is no doubt more apparent to those who are by its application excluded from taking what the testator intended them to take. The rule is so well established and its ambit so clearly laid down that if the present case did not raise a point of equity, which I do not think has ever been directly decided, there would be little more to say. Having regard, however, to this point of equity I will endeavour to state very shortly what this rule is in general though not in exhaustive terms.

The rule may be divided into three heads. First, if there is an immediate gift in a will to A.'s children the rule lays down that only those children in existence at the testator's death shall take, although his intention was obviously different. By way of exception to this first head, if there are no children of A. in existence at the testator's death then the rule of convenience ceases to operate, and all subsequently born children take in accordance with the testator's intention. The second head of the rule may be stated as follows. If the gift is in futuro, as for instance to A. for life with remainder to B.'s children, the rule provides that only those children of B. shall take who come into existence before A.'s death. Here again there is an exception that

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if there are no children of B. in esse before A.'s death, then the rule ceases to operate, and all subsequently born children take. The third head may be stated as follows: Where there is a gift to A. for life and after his death to B.'s children who attain twenty-one, then if at A.'s death there are children of B. who have attained twenty-one or the representatives of such children, the rule applies and the class closes. If at A.'s death there are only infant children of B. who subsequently attain twenty-one then again the class closes when the first child so attains that age; and in all cases the rule is excluded if there is an express intention of the testator to the contrary.

I have tried to formulate the rule in this manner in order to appreciate the exact question as to its application which arises in the present case, although the language and headings in and under which I have stated the rule are not intended to be exhaustive. In the present case there is a power of appointment contained in the clause of the will in question, and the first matter to be discussed is the extent, if any, of alteration in the application of the rule which is or may be made by the existence of this power. The nearest case which counsel have been able to find on this point is *Coleman* v. *Seymour*. (1) This was a case of an immediate gift as distinct from a gift in futuro. "A man devised to his daughter Jane, wife of Coleman, 3000*l*. for the use of her younger children, to be by her distributed among them in such manner, shares, and proportions, as she shall think fit: and if no appointment was made by her, then equally to be divided among her younger children: and to survive, if any of the children died under age or unmarried. The first question was, whether the legacy should be for those younger children only, which she had at that time by that husband; or whether the younger children by any future husband should also take." Lord Hardwicke L.C. decided that this was a vested present legacy in the children existing at the date of the will and the death of the testator subject as to variation between them by the exercise of the power, but

(1) 1 Ves. Sen. 209.

that the power did not extend to enable Jane to include in the class any younger children by a later marriage. In one sense Lord Hardwicke, of course, applied this rule, but there is ground for saying that he may have come to his conclusion on a question of construction without applying the rule at all. If he came to the conclusion that there being these younger children in existence at the date of the will and at the date of the testator's death he (the testator) only intended by the expression " younger children," those existing children to be benefited, then there was no need to apply the rule. The Lord Chancellor in his judgment leaves it perhaps in doubt whether and to what extent he thought the rule was necessary for his decision, because he says (1): " As to any children that may be born of a second marriage: they could not be intended; for she having four children by Coleman at the making of the will, if after his death she married a second husband, having a great estate settled on the elder son of that marriage, that son within the description of a younger child would have been contrary to the intent." Then he goes on: " But the words could not take in the children born subsequent to the making, or death of the testator; being a present legacy. It might be different had he given it to her for life, and afterward to her younger children: because then it would be contingent, and a devise over: but here it is in present; and the same as if he had said, equally to be divided unless she appoints; being a vested interest and immediate gift to them, subject to the power of variation given to the mother. Nor does the clause of survivorship make any difference, being still vested: this legacy then both in the intent and words is present to them and not to be extended to those born after his death: and it can only mean children living at the making of the will, or at farthest at the death of the testator." Well, that is quite consistent with the Lord Chancellor reading that the general expression " younger children " must be dealt with in accordance with the rule, and if Jane had further children the class could not be thereby opened in consequence of the

(1) 1 Ves. Sen. 210.

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application of the rule, these being present vested gifts in the then younger children at the death of the testator. The text-books regard this case as being one in which the rule was applied, although it is not a very strong one as far as extending the rule is concerned, as it is quite consistent with the Lord Chancellor's judgment that he decided it on the construction of the gift itself without necessarily having to resort to the rule.

Before proceeding, it is interesting to try and ascertain the origin of the rule in the circumstances in which it came to be made. As far as the text-books are concerned it is, I think, throughout treated as a rule of convenience, by which a person having a vested interest at a date is entitled to be paid and those who come into existence afterwards are excluded in order to permit a distribution at the vested date of payment, but that does not satisfy me as to why it should ever have been made at all. If a man leaves his property to A. B.'s children, why it should be a rule of convenience that one child shall take and another be excluded is difficult to see, especially if one considers the interest of the second child. The only explanation that I can find of the origin of this rule and which if it is accurate enables one the more easily to determine upon its application in a difficult case is a statement by Buckley J. in *In re Stephens.* (1) The learned judge said: "When the rule is adopted the solution arrived at is the result of an endeavour by the Court to reconcile two apparently inconsistent directions—the one that the whole class of children shall take, and the other that the fund shall be divided at a moment when the whole class cannot be ascertained." That is the most intelligent reason for this rule that I have been able to discover. If it be the fact in any case that a testator has given two apparently inconsistent directions, the one as to when his fund shall be divided and the other as to who shall take, then there seems little inconsistency or hardship in the Court trying to give effect to the testator's intention to be derived, although with difficulty, from two apparently inconsistent

(1) [1904] 1 Ch. 322, 328.

directions. And it seems to me, with great respect to the many decisions in the past, that if you can discover from a testator's will a direction or intention that the fund in question shall be distributed at a certain time and a direction that the class of people who shall take it are such that at that particular time of distribution they cannot be wholly ascertained, there only being some in existence, then it does not seem very difficult to appreciate the reason for cutting the knot in the way that has been done. Whether that explanation is consistent with all the decisions in which the rule has been applied I do not propose to state or inquire.

In *In re White's Trusts* (1), a case where a power existed, Wood V.-C. said: "In a case where the donee of the power survives the tenant for life, there would be a possible ground for arguing that the class must be kept in suspense long enough to let in all who might be born while the power was in existence." This is a very striking passage, because it apparently refers to a case where a testator gave property to A. B. for life with remainder to the children of C. D. as X. should appoint, and one would have thought that in that case, as long as the power of appointment existed, it would really be impossible to apply the rule in favour of any particular children of C. D. who were in existence before A. B.'s death. However, there is this doubt expressed; but speaking for myself I should have thought that if the power had been such as I have suggested it would have been quite impossible to apply the rule to the children of C. D. in esse before A. B.'s death, so long as the power is in existence which might alter the people who may ultimately take. I mention that as showing the extraordinary force that has come to be given to this so called rule of convenience.

The fact that the rule when applied more or less defeats the intention of the testator does not seem to be disputed. Many judges have commented upon it and some have deplored it. In *In re Emmet's Estate* (2) a testator gave the income of his property to H. E. for life, and after his death he gave one-third of his property in trust for all and every

(1) John. 656, 659. (2) 13 Ch. D. 484.

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the children of G., the shares to be conveyed and paid to them at twenty-one or marriage. H. E., the tenant for life, died a bachelor. At his death G. was a widower with two children. He married again, and when his eldest child attained twenty-one he had six children, all of whom lived to attain that age. Another child was born afterwards, and it was held by Hall V.-C. and the Court of Appeal that the six children or their representatives were entitled and the after-born child was excluded. That is an instance of the third head of the rule to which I referred. Hall V.-C. says (1): "The rule which permits any future born child to be let in until the time when one child attains the age at which he is entitled to call for an actual payment over of his share, may, as Lord Loughborough said in *Andrews* v. *Partington* (2), occasion wonder to any person who is not trying a case according to legal decisions. . . . . Whether any one can or cannot understand the rule, it is one founded upon convenience: as it would not allow the going beyond the particular time when one of the children could say 'actually pay me over my share.'" Later on he says (3): "The authorities seem to me to amount to this: that where, upon looking at the whole will, the testator must be considered to have made it upon the basis or footing of adopting or taking a certain time as the period of distribution or division, the Court must, taking that period, construe the will accordingly, although possibly it is not the period for the actual distribution of the fund." That I think is in exact accordance with the views expressed by Buckley J. That case went to the Court of Appeal, and Jessel M.R. said (4): "Under that will any layman would understand that all the children of George Nelson Emmet, at whatever time they were born, would become entitled, and in the absence of authority so should I. There has, however, been established a rule of convenience, not founded on any view of the testator's intention, that since when a child wants its share it is convenient that the payment of the share should not be deferred, it shall be made payable by preventing

(1) 13 Ch. D. 488.
(2) (1791) 3 Bro. C. C. 401, 404.
(3) 13 Ch. D. 489.
(4) 13 Ch. D. 490.

any child born after that time from participating in the fund. The rule is, that, so soon as any child would, if the class were not susceptible of increase, be entitled to call for payment, the class shall become incapable of being increased. That rule of convenience, being opposed to the intention, is not to be applied where it is not necessary, there being also a rule that you let in all who are born up to the time when a share becomes payable." Then he discusses the particular case before him.

Now assuming as I do that this rule originated in attempting to solve two apparently inconsistent directions, one must find, in order to apply it, a period of distribution fixed or pointed to by the testator and a class to take at that period which may subsequently be extended beyond its then numbers. In the present case, having regard to the fact that one is asked to depart from the testator's intention, clause 13, upon which the present question turns, may be looked at from many points of view. There is no doubt that the testator points to a period of distribution which he refers to as "from and after the expiration of 21 years," but it is extremely difficult to say that he takes that as a period when anybody will be entitled to call for anything while Richard is living, because from and after the expiration of twenty-one years subject to the prior interests he gave and bequeathed this fund in trust for the child or children and remoter issue of Richard as he should by will appoint. And it is difficult for me, at all events, to imagine that this testator dreamt for a moment that during Richard's lifetime one of his children should take to the exclusion of others, if any, who might be born. But the matter does not end there, because in default of such appointment and so far as the appointment shall not extend, the testator bequeathed this fund in trust for all the children of Richard who being sons should attain twenty-one or being daughters should attain that age or marry. When Archibald, the son of Richard, attained twenty-one, he, being at that time Richard's only child, had a vested interest in this fund subject to its being divested or varied in amount either by Richard appointing by will if there was any person other

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than Archibald to whom such appointment could be made, or, by there being other children born to Richard during the existence of this power.

So much for clause 13 if nothing further had happened to this power except Richard's death leaving it unexecuted. But the real difficulty in this case arises from the fact that, notwithstanding the apparently express intention of this testator in the direction I have pointed out, the power given to Richard is a right which he by law can release. Richard has released his power and is still living, so that under the testator's own directions the trust in default must inevitably operate. If there had been no interposed power this would then have been a perfectly simple case within the third head of the rule, because it would then have been a gift on the expiration of a period, that is a gift in futuro for all Richard's children who being sons should attain twenty-one or being daughters should attain that age or marry, and the class would be closed upon Archibald attaining twenty-one during the twenty-one years' period. The difficulty I feel in this case is that the rule in question being one which, although absolutely binding upon me is not to be extended except where necessary, especially having regard to the fact that it is a rule which defeats in most cases where it is applied the deliberate intention of the testator, is whether the trust in default in clause 13 ought not to be considered as expressly extending to all Richard's children, who being sons shall attain twenty-one or being daughters shall attain that age or marry. If there is a direction which necessitates that construction then the rule ought not to be applied to it.

On the whole, although with considerable misgivings, I have come to the conclusion that it being within the legal power or right of the donee of this power to release it, clause 13 ought, from the date of the release and in the events which have happened, to be construed as a trust after the twenty-one years' period for all Richard's children who being sons shall attain twenty-one or being daughters shall attain that age or marry. If that is the true construction then the rule applies beyond all question. I think myself, on the

whole, that that is the construction that I am bound to adopt, and that the fund now being distributable in accordance with the trust in default, the rule must apply, and notwithstanding the circumstances in which the power was released and the fact that thereby the property has come to Richard under his son's will, I think that the question in the summons must be answered in the first alternative and that Richard's future born children, if any, will not be entitled to participate in this fund.

There is a second question in the summons as to what will happen to the three-fifths bequeathed to Harriette for life under clause 14. This is a future question with which I have not been asked to deal, and it will stand over accordingly.

Solicitors : *Farman, Daniell & Co. ; Patersons, Snow & Co., for Hart, Reade & Co., Eastbourne.*

G. R. A.

In re ALICE PAULINE FREEMAN (A PERSON OF UNSOUND MIND NOT SO FOUND).

Lunacy—Practice—Application for Settlement of Lunatic's Property—Second Cousins—Change in Law of Intestacy—Change in Circumstances—"Suffer an injustice"—Form of Order—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 171, *sub-s.* 1 (*b*), (*c*)—*Administration of Estates Act,* 1925 (15 *Geo.* 5, *c.* 23), *s.* 46, *sub-s.* 1 (*v.*).

By s. 171, sub-s. 1, of the Law of Property Act, 1925 : "The Court may direct a settlement to be made of the property of a lunatic . . . . on such trusts and subject to such powers and provisions as the Court may deem expedient, and in particular may give such directions . . . : (*b*) where the property has been acquired under a settlement, a will or an intestacy, or represents property so acquired ; or (*c*) where by reason of any change in the law of intestacy or of any change in circumstances since the execution by the lunatic . . . . of a testamentary disposition . . . . or for any other special reason the Court is satisfied that any person might suffer an injustice if the property were allowed to devolve as undisposed of on the death intestate of the lunatic . . . . or under any testamentary disposition executed by him":—

Held, that the phrase "suffer an injustice" in cl. (*c*) of sub-s. 1 must not be rigidly confined to a deprivation of a strict legal right,

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since that would stultify the operation of the section altogether. It must in its context include the destruction of a clear moral claim or even the disappointment of a thoroughly legitimate and well founded expectation.

A lunatic not so found had been of unsound mind since 1882. She was a spinster aged eighty-one, and was possessed of personal property of the value of about 2000*l.* From the time when she became of unsound mind she had lived under the care of an uncle and aunt, who had provided some 2076*l.* towards her maintenance. The uncle died in 1885 and the aunt in 1907. By the will of the latter an annuity of 300*l.* was bequeathed for the support of the lunatic. Upon the death of the aunt a sister of the lunatic was appointed receiver of her estate and acted until 1920, when she was relieved and a sister of the applicants was appointed in her place. On her death in 1925 one of the applicants was appointed and was now receiver of the lunatic's estate. In 1880 before her reason left her the lunatic made a will, by which she bequeathed her property to her three sisters, all of whom were now dead. On an application to the Court by the two applicants, who were the residuary legatees under the aunt's will and second cousins of the lunatic, to exercise the powers vested in it by s. 171 of the Act of 1925, and to direct a settlement to be made of the property of the lunatic.

Held, that in the circumstances the applicants would "suffer an injustice" within the meaning of sub-s. 1 (*c*) of the section if the recent change in the law of intestacy were allowed to defeat the moral claim which they had to succeed to the estate of the lunatic, particularly in view of the continuous recognition, pecuniary and otherwise, which their side of the family had throughout shown of the obligations imposed on them by their kinship to the lunatic.

Held, also, that there had been "a change of circumstances" within the meaning of the same sub-section since the execution by the lunatic of her will by reason of the deaths of her three sisters to whom she had left her property.

Held, therefore, that the case was one in which the Court ought to exercise the discretion vested in it by s. 171 by directing the receiver to execute a settlement of the property of the lunatic, to be approved by the judge in lunacy, which must be subject during the life of the lunatic to her right to be maintained out of the income, and if and so far as might be necessary out of the capital thereof, and subject also to any effective disposition by will or deed which the lunatic might make should she recover.

THIS was a summons taken out by Charles Arthur Freeman and Percy Benjamin Freeman under the Lunacy Act, 1890, and amending Acts, in the matter of Alice Pauline Freeman, a person of unsound mind not so found, asking (inter alia) that pursuant to s. 171 of the Law of Property Act, 1925, a settlement might be directed of the property of the lunatic on such trusts for the benefit of the applicants or otherwise

and subject to such powers and provisions as the Court might deem expedient.

The following statement of facts is taken from the considered judgment of the Master of the Rolls :—

" Alice Pauline Freeman is a spinster, now aged eighty-one, and she has been a lunatic not so found, since the year 1882. She is possessed of personal property of the value of about 2000*l.*, over which she would, if not mentally incapable, have the power of disposition.

" The applicants are her second cousins.

" From the time when she became of unsound mind, she lived under the care of her uncle and aunt, Charles Henry Freeman and his sister, Sarah Grace Freeman. The uncle died on November 21, 1885, leaving an estate of over 30,000*l.* to his sister absolutely. The aunt died on February 9, 1907, leaving an estate of over 60,000*l.* and provided thereout an annuity of 300*l.* for the support of her niece.

" The applicants are, in the events which have happened, the residuary legatees of the aunt. While they had taken charge of the patient, the uncle and aunt had provided some 2076*l.* towards her maintenance. Upon the death of Sarah Grace Freeman, the sister of the patient was appointed receiver of her estate and acted until June 1, 1920, when she was relieved, and Maude Marion Freeman, a sister of the present applicants, was appointed in her place. Maude Marion Freeman died in March, 1925, and on August 28, 1925, Charles Arthur Freeman, one of the applicants, was appointed and is now receiver of the patient's estate.

" It appears that the patient, before her reason left her, made more than one will. In the last, made in 1880, she bequeathed her property to her three sisters. All these have predeceased her."

By the Law of Property Act, 1925, s. 171, sub-s. 1 : " The Court may direct a settlement to be made of the property of a lunatic or defective, or any part thereof or any interest therein, on such trusts and subject to such powers and provisions as the Court may deem expedient, and in particular may give such directions. . . . .

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(*b*) where the property has been acquired under a settlement, a will or an intestacy, or represents property so acquired; or

(*c*) where by reason of any change in the law of intestacy or of any change in circumstances since the execution by the lunatic or defective of a testamentary disposition, or of any absence of information at the time of such execution, or on account of the former management of the property or the expenditure of money in improving or maintaining the same or for any other special reason the Court is satisfied that any person might suffer an injustice if the property were allowed to devolve as undisposed of on the death intestate of the lunatic or defective or under any testamentary disposition executed by him."

Sub-s. 2 provides for the execution by the receiver of the necessary instrument to carry out the directions of the Court.

Sub-s. 3 provides that the section shall apply whether or not the lunatic has executed a testamentary disposition.

By sub-s. 4: "Any person who under the Administration of Estates Act, 1925, has, or if that Act, or any enactment which it replaces, had not been passed would have had, a spes successionis (whether under any testamentary disposition which is known to exist or in the event of the intestacy of the lunatic or defective) or an interest in the property of the lunatic or defective or in any part thereof, as well as the committee or receiver and any other person who may be authorised by rules made under this section, shall have power to apply to the Court for an order under this section."

By sub-s. 5: "Subject to making due provision for the maintenance of the lunatic or defective in accordance with his station in life, whether out of the capital or income of the property settled or other property or partly in one way and partly in another, and to providing, by means of a power of appointment or revocation, or otherwise, for the possibility of the lunatic or defective recovering full capacity, the Court may, in making any order under this section, have regard to" the matters therein specified.

The summons was, by the direction of the Lords Justices, adjourned into Court, and was heard on December 20, 1926.

Topham K.C. and *C. A. J. Bonner* for the applicants. The two grounds on which it is submitted the present case falls within s. 171 of the Law of Property Act, 1925, are that there has been: (1.) a change in the law of intestacy, and (2.) a change in circumstances. The first question is to what extent does the section give a new jurisdiction to the Court. Before the Act there was jurisdiction in the Court in certain cases to direct a settlement to be made of the lunatic's property. The intention of s. 171 was, it is submitted, to give the Court a wider discretion than it had before, and to enable the Court to enforce something in the nature of an equity to a settlement in the case of persons who had expectations from the lunatic. The high water mark of the exercise of the discretion under the former law is the case referred to in Theobald on the Law relating to Lunacy, p. 364.

[LORD HANWORTH M.R. That case is interesting historically, but it does not affect the exercise of our discretion under the present section.]

Under that section the jurisdiction is expressed in wider terms. It is not suggested that in every case in which a second or third cousin is cut out the Court will direct a settlement in his favour. The cousin, for example, may have gone abroad and be altogether out of touch with the lunatic. Each case must be considered with reference to its own circumstances. The policy of the Act was that beneficial interests should not be interfered with more than was necessary. There are indications in the Act that interests in the nature of spes successionis are not to be interfered with. Under s. 46 of the Administration of Estates Act, 1925, which deals with the order of succession to real and personal estate on an intestacy, the statutory trusts for uncles and aunts referred to in sub-s. 1 (*v*) are not for uncles and aunts only, but also for their descendants. If the lunatic here had made a disposition in favour of her uncle or aunt the applicants would have succeeded. Sect. 51, sub-s. 2, of the same Act

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provides that "The foregoing provisions of this Part of this Act do not apply to any beneficial interest in real estate . . . . to which a lunatic . . . . living and of full age at the commencement of this Act, and unable, by reason of his incapacity to make a will, who thereafter dies intestate in respect of such interest. . . . ." That means that if the lunatic had died entitled to real estate the heir at law would take notwithstanding the change in the law. The reason why a similar provision is not made with regard to personal estate is because of the discretionary power given to the Court by s. 171 to make a settlement.

[LORD HANWORTH M.R. It all comes back to cl. (*c*) of sub-s. 1 of s. 171.]

On the facts it is submitted that the case falls within that clause, and that inasmuch as more money was spent upon the maintenance of the lunatic by the uncle and aunt than the whole fund now in question, the fair thing would be either to direct a settlement in favour of the applicants and the children of their deceased sister, Mrs. Horn, or to put the amount back into the aunt's estate, in which case the same persons would be entitled to it as the residuary legatees under her will.

Sir Thomas Inskip S.-G. and *Dighton Pollock* for the Crown. The Crown is less concerned with the circumstances of this particular case than with the principle involved. It is submitted that no injustice is caused to the applicants in this case by the alteration of the law. It is not sufficient for them to show that a change in their position has been made by an alteration in the law, but they must go further, and show that by that alteration in the law an injustice has been done to them. The jurisdiction given to the Court by sub-s. 1 of s. 171 of the Law of Property Act, 1925, is expressed in wide terms. Clause (*c*) of the sub-section specifies five particular reasons for the exercise by the Court of the jurisdiction, the two first of which alone are material to this case. The Court must find: (1.) a change in the law of intestacy, and (2.) a change in circumstances, and that there is some injustice caused by or consequent on such change.

It is not to be assumed that the alteration in the law has caused an injustice merely because it has deprived persons of property, which but for such alteration they had a chance of obtaining. There is no evidence here to show that the aunt Sarah Grace Freeman, if she had not spent the 2000*l.* on the maintenance of the lunatic, would have left it to the applicants. The lunatic was a much nearer relation to her than the applicants, who are only second cousins of the lunatic. There is therefore no injustice done to the applicants.

[SARGANT L.J. The word "injustice" in the sub-section cannot have its ordinary meaning, because a change in the law cannot be an injustice.]

It is a matter of pure speculation whether the lunatic would have left her property to second cousins. To say that the fact of second cousinship gave the applicants a reasonable expectation of succeeding to the property would be going too far. It might perhaps be described as a sporting chance, and it certainly was not sufficient for the deprivation of it to amount to an "injustice." The powers given by the section ought not to be exercised on light grounds. Regard must be had to the practice in lunacy as it existed before the passing of the new Acts: see *Ex parte Whitbread* (1); *In re Evans* (2); *In re Darling.* (3) There is nothing here to show a strong probability that the lunatic, if sane, would, on the death of the survivor of her three sisters, have made a will in favour of the applicants.

Topham K.C. in reply.

Cur. adv. vult.

Jan. 17. The following written judgments were delivered:

LORD HANWORTH M.R. This is an application to the Court to exercise the powers with which it is invested by s. 171 of the Law of Property Act, 1925, and to direct a settlement to be made of the property of a lunatic.

As the section gives new powers, the Court decided to have

(1) (1816) 2 Mer. 99. (2) (1882) 21 Ch. D. 297.
(3) (1888) 39 Ch. D. 208.

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the matter argued in Court, as the case may serve to elucidate the powers conferred upon the Court, and the limits within which it may, and will, act. [His Lordship stated the facts as above set out and continued :] These facts appear to justify the inferences : (1.) that the patient would, if she could, have made some testamentary disposition of her property, and (2.) that the estate of the aunt, Sarah Grace Freeman, would have been somewhat larger, if it had not borne the expense of the patient's maintenance.

It is clear that his late sister, Marion, and the applicant, Charles, have worthily discharged their duty towards the patient. They, with their brother, the other applicant, appear to have been on intimate terms with their relative and seen a good deal of her until her health gave way. The members of the family to whom I have referred appear to have kept touch one with another. It is not known whether the patient has any relatives on the maternal side.

At the same time, it must not be overlooked that upon the summary of the facts above given, it cannot be said that the applicants had any justification for holding definite expectations that they would, upon the patient's death, benefit from her estate, though such an anticipation might be termed legitimate ; nor is it certain that if provision had not been made for the patient, the estate of Sarah Grace Freeman would not have been diminished otherwise.

By the law as it stood up to December 31, 1925, if the patient had died intestate, the applicants would have been entitled to share in her estate. Now by the Administration of Estates Act, 1925, s. 46, sub-s. 1 (*v*), not being nearer than second cousins, that right is defeated. It must also be stated that, as the patient had made a will, there is strong presumption that she would, by another will or codicil, have altered her dispositions as the events of the deaths of her three sisters successively demanded, and not have left her estate to pass as bona vacantia to the Crown.

I come now to consider s. 171. It confers a general power, and there follows a series of particular cases in which directions may be given. These particular cases do not,

in my judgment, restrict or cut down the general power. Clauses (*b*) and (*c*) of sub-s. 1 are those which are applicable to the present facts, for the patient's property is not the product of her earnings, but acquired by her under a will. Clause (*c*) is the important clause. By that clause, which specifies particular circumstances, where "the Court is satisfied that any person might suffer an injustice if the property were allowed to devolve as undisposed of on the death intestate of the lunatic or defective or under any testamentary disposition executed by him," the Court may direct a settlement to be made of the property of the lunatic. From the collocation of the sentences it seems impossible to interpret the words "might suffer an injustice" strictly, for one of the occasions on which the intervention of the Court is specified as possible is where there has been a change in the law, and upon such a change being made, injustice necessarily ceases.

In my judgment, therefore, "an injustice" must be construed in a wider sense. It must connote unfairness and import a sense of grievance, at "the hand of stern injustice and confused wrong" (Shakespeare, King John, Act V., sc. 2). It must be used of such a case as where by a change of the law property would go awry; so that those who use the term "injustice" colloquially might think it not inappropriate for the purpose of conveying the meaning that the new legislation had worked regrettably, and against the interests of those who would otherwise have enjoyed advantages.

Dealing with the next words of the clause, there has in the present case been "a change in circumstances since the execution by the lunatic or defective of a testamentary disposition," for her three sisters to whom she left her property by her will have all passed away.

Thus both the first conditions of cl. (*c*) apply here. The applicants have by a change of the law of intestacy lost the right to share in the patient's estate, which they would have had before January 1, 1926, and there has been a change of circumstances, as already pointed out. But the question remains, ought the Court to be satisfied that the applicants

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might suffer an injustice if no direction were given? The cl. (*c*) seems to be in its purpose a transitory provision. The change of law will become remote as time passes.

No question arises here, as in *In re Evans* (1), as to making a present allotment of part of the surplus income of a lunatic in favour of a cousin in reduced circumstances, or of increasing allowances to relations which the lunatic, while sane, had made, and which the Court authorized to continue, as in *In re Darling.* (2)

The test which the Court ought to apply is stated by Fry L.J. (3) in the latter case in summarizing the effect of the cases. The judge "has to see what it is likely the lunatic himself would do if sane." Applying that rule to the present case, I am satisfied that, if sane, the patient would have made some effective disposition of her property and that, in all the circumstances, she would have selected as recipients those with whom she was associated over forty years ago, who have stood by her, and who remain.

It is thus possible, and in my judgment proper, to direct a settlement to be prepared on the ground of change of circumstances, and on the basis that those, who might have been considered as suitable beneficiaries under a will of the patient, by reason of the change in the law would suffer an injustice by total exclusion if she died intestate and her property devolved as bona vacantia.

I desire to add that it is not possible, and if possible it would not be wise, to attempt an exhaustive exposition of the section, or to lay down definite rules on which the Court will act under it. Each case must be considered upon its own facts, and the cases decided may eventually establish rules for guidance. It is sufficient to say that in the present case, in my judgment, the applicants have made out a case for a direction to be given by the Court. There is no desire on their part to exclude any maternal relations who are in relation to the patient similar to themselves, and the order will be as indicated by Sargant L.J.

(1) 21 Ch. D. 297. (2) 39 Ch. D. 208.
(3) 39 Ch. D. 213.

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SARGANT L.J. This application as amended is for the settlement under s. 171 of a fund in Court belonging to one Alice Pauline Freeman (hereafter referred to as "the patient"), a person of unsound mind not so found. The fund is of the value of some 1800*l.*, and represents her share of the residuary estate of her father, John Grace Freeman, who died in the year 1878. The applicants, Percy Benjamin Freeman and Charles Arthur Freeman, are second cousins of the patient who, but for the changes in the law embodied in the Administration of Estates Act, 1925, would have had a spes successionis in respect of this fund; and they base their claim to the creation of a settlement wholly or partially in their favour on the ground that there are "special reasons" within the meaning of sub-s. 1 (*c*) of that section, sufficient to satisfy the Court that they would "suffer an injustice" within the sub-section if the property were allowed to devolve as undisposed of on the death of the patient. For the purposes of the section now in question the Court (in the absence of any rules of Court) means the Judge in Lunacy, and the application comes before us in that capacity.

The section is based on somewhat different considerations from those on which settlements of the property of lunatics have hitherto been effected under the general jurisdiction in lunacy. Such settlements have depended upon their being considered to be for the benefit of the lunatics themselves, though a large view has been taken as to what is for the benefit of the lunatic and full play has been given to family considerations, such as the establishment of the legitimacy of children or the maintenance of the position of a successor to a title: see Theobald's Law relating to Lunacy, ch. XLV. (1.). Sect. 171, on the other hand, authorizes settlements not for the purpose of benefiting the lunatic, but for the purpose of preventing injustice that might be suffered by others, if property were allowed to devolve as on a total or partial intestacy. Such a purpose can hardly be considered as being even indirectly for the benefit of a lunatic, unless indeed it was in the mind of the Legislature that the memory of a deceased lunatic should not be tarnished

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by the unconscious perpetration of an injustice to others, which he would not have allowed had he been of full memory and understanding.

It may be of advantage to contrast s. 171 with the contemporaneous enactment of s. 51, sub-s. 2, of the Administration of Estates Act, 1925. That sub-section, dealing exclusively with real estate, the devolution of which is even more radically affected than that of personal estate, proceeds by way of positive rigid enactment; and further it is transitory only in character; that is, applies only to lunacies existing on January 1, 1926, and continuing to the date of death. On the other hand, s. 171 of the Law of Property Act, 1925, which applies to all kinds of property, operates merely by way of entrusting discretionary powers to the Court, and further is to a great extent part of the permanent law of the land. No doubt the first and perhaps the most important of the five or six "special reasons," which are particularly mentioned in sub-s. 1 (*c*) as justifying the intervention of the Court, is wholly or mainly of a transitory nature; and possibly the alterations in the devolution of property which were being simultaneously enacted may have been the occasion out of which the suggestion of discretionary settlements by the Court originated. But, however that may be, the subsequent four or five "special reasons" may arise in the course of any lunacy, whether existing on January 1, 1926, or occurring subsequently; and there is not in my judgment any reason in such cases for confining the operation of s. 171 to existing lunacies only.

Some attention must also be paid to the meaning of the important words "suffer an injustice," since it is an essential condition of the operation of the section that some person might otherwise "suffer an injustice." It is clear that the phrase must not be rigidly confined to a deprivation of a strict legal right, since that would stultify the operation of the section altogether; and indeed the Solicitor-General in his argument for the Crown did not seek to narrow the meaning of the words so far as this. The phrase in its context must I think include the destruction of a clear moral claim

or even the disappointment of a thoroughly legitimate and well founded expectation, though these phrases themselves, or any other synonyms that may be suggested for the injustice mentioned in the section, are necessarily of a rather vague character, and will gather definiteness only as particular cases come to be decided from time to time by the Court. On the present occasion it is necessary to consider the particular relations of the patient and the applicants, for the purpose of determining whether they would "suffer an injustice" in the extended meaning of the phrase, if the fund in question should under the new legislation be allowed to devolve on the Crown.

The patient herself is of the age of eighty years, has never been married, and has been of unsound mind for forty-five years or thereabouts, that is, since some date in the year 1882. Her mother is believed to have been the only child of her grandfather George Smith; it is therefore highly improbable that she should have any relations on the maternal side as near to her in blood as the applicants; and they do not in fact know of any relations at all of hers on that side. By will dated in or about the year 1880 (a copy of which is amongst the papers of the patient kept by her family solicitors) the patient has apparently made provision exclusively for her three sisters, but all such provisions have long since lapsed by reason of the intervening deaths of all these sisters. The applicants, as appears from a pedigree duly exhibited to an affidavit, are the sole next of kin of the patient on the paternal side (and therefore almost certainly her sole next of kin on either side), but they are willing that three children of a Mr. William Freeman Horn deceased, who was in the same relationship to the patient as the applicants, and took with them under the will of Sarah Grace Freeman hereinafter mentioned, should participate with the applicants in the benefits of any settlement that should be made.

From the time that the patient became of unsound mind until the death of her aunt, Sarah Grace Freeman, in the year 1907 (when the patient became entitled under this

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aunt's will to an annuity of 300*l.*), the patient's income was quite insufficient for her maintenance at the Priory, Roehampton, where she was taken charge of; and during all those years sums considerably exceeding the funds now in question and in fact amounting to some 2676*l.* were contributed to her support by her uncle Charles Henry Freeman and her aunt Sarah Grace Freeman. The said Sarah Grace Freeman was the residuary legatee under the will of the said Charles Henry Freeman; and the applicants, their sister since deceased—namely, Maude Marion Freeman—and the said William Freeman Horn were the residuary legatees under the will of the said Sarah Grace Freeman. The applicants have based some claim on the residuary estate under the last mentioned will having been diminished by reason of this expenditure of the uncle and aunt for the benefit of the patient. But any such claim is so slight as to be wholly insufficient by itself, and to be hardly appreciable even in conjunction with the other circumstances of the case. What is more important is that the applicants' immediate family have thoroughly recognized their duties to the patient, since from the death of the aunt in the year 1907 the said Maude Marion Freeman acted as receiver for the patient till her own death in the year 1925, and since that death the applicant Charles Arthur Freeman has so acted.

In all the circumstances of the case I am of opinion that the applicants would suffer an injustice within the meaning of the section if the recent change in the law were allowed to defeat the moral claim which they had to succeed to the estate of the patient, particularly in view of the continuous recognition, pecuniary and other, which their side of the family had throughout shown of the obligations imposed on them by their kinship to the patient.

The receiver should, therefore, be directed to execute a settlement to be approved by the Judge in Lunacy of the fund subject, during the life of the patient, to her right to be maintained out of the income, and, if and so far as may be necessary, out of the capital thereof. The interests of the beneficiaries under the settlement will, of course, be

subject to any effective disposition that may have been already made by the patient by any will and also to any will or deed that she may hereafter execute should she recover ; and will also be subject to the right of any next of kin of the patient under the present law, should it appear that there are any such at her death, as may possibly be the case, on the maternal side. The beneficiaries under the settlement will be the applicants and (in view of their consent) the three children of William Freeman How, such children taking collectively the same share as each of the applicants. There seems no sufficient reason why vested interests should not be given to the beneficiaries, and accordingly each of the applicants will take an undivided third share and each of the said three children an undivided ninth share.

The costs of the applicants and the Attorney-General will be taxed as between solicitor and client and will be paid out of the fund in Court.

I spoke of the fund in Court. I think that the fifty shares in a company are not strictly speaking in Court. I meant my remarks to apply to those shares as well as to the fund which is strictly in Court.

LAWRENCE L.J. I agree that this is a proper case for a settlement under s. 171 of the Law of Property Act, 1925.

In my opinion the power conferred by that section on the Court to direct a settlement is not limited to cases which fall within the particular instances given in clauses (*a*) to (*c*) of sub-s. 1. On the present occasion, however, it is unnecessary to travel outside those given in clauses (*b*) and (*c*).

The property, of which the applicants ask the Court to direct a settlement, is (or represents) property acquired by the patient under the will of her father John Grace Freeman, and therefore the case is one which falls under cl. (*b*).

In my opinion it also falls under cl. (*c*). The expression, " suffer an injustice," in this clause must, I think, be construed in the extended and popular sense as meaning " be

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unfair to," because to allow property to devolve according to law on an intestacy or under a testamentary disposition cannot properly be called an injustice in the strict sense of involving the violation or withholding of a legal right.

If this be the true construction of the expression I am satisfied that the applicants in the circumstances of the present case might suffer an injustice within the meaning of cl. (*c*) if the property were to be allowed to devolve as on an intestacy.

The applicants were on intimate terms with the patient down to the time when she became mentally afflicted, and later on, when her nearer relations were unable any longer to look after her, did what they could for her. Moreover, the applicant Charles Arthur Freeman took upon himself the burden of receivership.

In my opinion it would not be making too violent an assumption to suppose that, had the patient been capable, she would in all probability after the death of her surviving sister have made a will in the applicants' favour rather than have allowed her property to pass to the Crown as bona vacantia.

As to the form of the settlement I concur in the terms outlined by Sargant L.J.

I also agree that the costs of all parties of and consequent upon this application as between solicitor and client should be paid out of the property the subject-matter of this application.

Application allowed.

Feb. 21. On January 29, after the delivery of the above judgments, but before the order had been passed and entered or the settlement directed by the Court had been executed, the applicant P. B. Freeman died, having by his will, dated in 1912, devised and bequeathed his residuary estate to trustees upon trust for his widow for life or until remarriage and after her death or remarriage upon trust as to two-thirds thereof to his son and as to the remaining one-third thereof to his daughter.

Topham K.C. for C. A. Freeman, the receiver and other applicant now mentioned the matter to the Court.

Dighton Pollock for the Crown.

LORD HANWORTH M.R. We will direct that the share of the applicant P. B. Freeman in the property of the lunatic be settled on trusts corresponding to the trusts declared by his will concerning his residuary estate and that our order in this case be dated as of to-day.

Solicitors for applicants: *Kendall, Price & Francis.*
Solicitor for Crown: *Solicitor to the Treasury.*

W. I. C.

SABATIER *v.* THE TRADING COMPANY.

[1926. S. 1306.]

Company—Foreign—Practice—Writ—Service on foreign Corporation—Service on Agent in London—Place of Business within United Kingdom—Administrative Work only done in London—Agent on Register authorized to accept Service after Business ended—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 274.

The plaintiff on March 30, 1926, issued a writ against the defendant company and A. its managing director, claiming to be interested, as assignee, in certain shares in the company, which was incorporated under the laws of the Russian Empire and was formed to carry on a business which it purchased from a private firm in Russia. The writ was served upon A., whose name was filed with the Registrar of Companies, under s. 274 of the Companies (Consolidation) Act, 1908, as a person authorized to accept service of process on behalf of the company. The company entered a conditional appearance, without prejudice to an application to set aside the service, upon the ground that A. was not a person authorized under that section to accept service on behalf of the company. On May 26, 1926, the company took out a summons for an order that service of the writ upon A. might be set aside on the ground above stated and on the ground that the company had not at the material time a place of business within the United Kingdom. Some years ago the company established a branch of their business in London under the management of A., who in December, 1920, in obedience to the requirements of s. 274, aforesaid on behalf of the company registered himself as a person resident in the United Kingdom authorized to accept service of process.

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The evidence showed that, although at the date of the service of the writ upon A. the company had long ceased to carry on trade in London, yet certain administrative activities—e.g., the remittance of dividends to shareholders—were then being carried out there, and at no other place, on behalf of the company.

Held, (1.) that upon the evidence, the defendant company, at the date of the service of the writ upon A., had a place of business within the United Kingdom, within the meaning of s. 274 of the Companies (Consolidation) Act, 1908, and that service upon A. was effective service upon the company; and (2.) that, even if the company had not at the date aforesaid a place of business within the United Kingdom, yet upon the true construction of the section and applying the principles of the decision in *Employers' Liability Insurance Corporation* v. *Sedgwick, Collins & Co.* [1927] A. C. 95, such service was effective service upon the company.

PROCEDURE SUMMONSES.

On March 30, 1926, Mr. Sabatier, as plaintiff, issued a writ claiming to be interested, as assignee under an assignment, dated in September, 1923, in certain shares in a Russian company and to be interested, as such assignee, in the profits of that Russian company and claiming certain incidental relief. To that writ he made the following defendants: first, a company named The Trading Company, the successors to Alexis Goobkine A. Koosnetzoff & Co. (a corporation established under Russian law) (hereinafter referred to as "the Russian company"); secondly, The Trading Company, the successors to Alexis Goobkine A. Koosnetzoff & Co. (a partnership firm) and hereinafter referred to as "the Russian partnership"); and thirdly, a Mr. Ampenoff, a Russian subject and a director of the Russian company. A firm of solicitors in the City of London who were acting for Mr. Ampenoff accepted service of the writ, and entered an appearance for Mr. Ampenoff; and on April 20, 1926, by arrangement and out of courtesy to the plaintiff, Mr. Ampenoff was at the office of his solicitors personally served with the writ as representing the Russian company, and was at the same time served with a further writ as representing, either as a partner or agent, the Russian partnership. On April 27 the same firm of solicitors entered a conditional appearance for the Russian company, the appearance being stated to

be without prejudice to an application to set aside the service of the writ upon Mr. Ampenoff as not being a person named under s. 274 of the Companies (Consolidation) Act, 1908, to accept service on behalf of the Russian company, and there was a note to that appearance: "This appearance is to stand as unconditional, unless the defendant applies within twenty-one days to set aside the writ, or service thereof, and obtains an order to that effect." The same firm of solicitors entered a conditional appearance for the Russian firm in these terms: "Without prejudice to an application to set aside service of the writ upon the said Ampenoff who is neither a partner nor manager of nor agent for any such partnership firm and upon the further ground that no such partnership firm exists"; and there was the same note on the appearance: "This appearance is to stand as unconditional, unless the defendant applies within twenty-one days to set aside the writ or service thereof, and obtains an order to that effect."

On May 17, 1926, the Russian company took out a summons for an order that the service of the writ upon Mr. Ampenoff might be set aside on the ground that Mr. Ampenoff was not the person named under s. 274 of the Companies (Consolidation) Act, 1908, to accept service on behalf of the Russian company and on the further ground that the Russian company had not at any material time or times any place of business in England. The same firm of solicitors, also on the same date, acting on the instructions of Mr. Ampenoff, issued a summons on the part of the Russian firm for an order that service of the writ on Mr. Ampenoff "may be set aside on the ground that Mr. Ampenoff is neither a partner nor manager of nor agent for any such partnership and upon the further ground that no such partnership firm exists."

The third summons was one issued on October 27, 1926, on the part of the plaintiff, for an order that the Russian partnership should "give security for the costs of the summons of the 17th May issued in its name." As regards the third summons, the summons for security for costs, it

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is sufficient to state that that summons was dismissed by Clauson J., but without costs.

In or about the year 1890 the Russian company was incorporated as a limited liability company under the laws of the Russian Empire, with the object of trading in tea and sugar and with the object of purchasing the business of a firm which then existed under the name of Alexis Goobkine, successor to A. Koosnetzoff & Co. After the formation of the Russian company and the purchase by that company of the business of the Russian firm (which was one of the objects of the company), the firm ceased to exist, and the two partners in that firm died many years ago. Under the statutes of the company, a translation of which had been filed under s. 274 of the Companies (Consolidation) Act, 1908, the management of the company was in the hands of directors, the appointment of whom was indicated in those statutes.

Some years ago (the exact date not appearing in evidence) the Russian company set up a branch in London at 33 and 35 Eastcheap, under the management of one Venevitinoff. In the year 1917 he was required by the Registrar of Business Names to furnish him with the names of all the persons interested in the Russian business carried on in the United Kingdom. Through a mistake in the use of the word "participants" by Mr. Venevitinoff (who was unfamiliar with the English language and nearly blind), which he identified with shareholders, but which the registrar understood as referring to partners in a firm, Mr. Venevitinoff delivered to the registrar a document containing the names of all the shareholders in the Russian company, which was accordingly filed pursuant to the provisions of the Registration of Business Names Act, 1916. In 1919 Mr. Venevitinoff ceased to be employed by the Russian company, and thereupon Mr. Ampenoff, who had been in the employment of the Russian company since 1899 and became a director thereof in 1918, took over the management of the London branch of the Russian company, although it appeared that little (if any) business was being done by the Russian company. In the year 1920 there was a discussion among the directors

of the Russian company, which took place in London, as to the closing down of the London branch, from which no formal decision resulted. In December, 1920, Mr. Ampenoff, as representing the Russian company, received a communication from the Registrar of Companies drawing attention to the provisions of s. 274 of the Companies (Consolidation) Act, 1908; and in view of that communication a translation of the statutes of the Russian company was registered under that section, and Mr. Ampenoff was named—apparently by himself, acting on behalf of the Russian company—as a person resident in the United Kingdom authorized to accept on behalf of the company service of process and any notices required to be served on the company; and on June 5, 1921, an entry on the file of the register was made to that effect. In his affidavit filed on June 8 Mr. Ampenoff deposed that at the beginning of 1921 he arrived in Constantinople and saw Mr. Vladimiroff, who was chairman of the Russian company, and died shortly afterwards; that after conference with him, he obtained his assent to close the London branch, as it was doing no business in England; that he subsequently obtained the assent of another director, Mr. Ouchkoff, who appeared to be resident in Paris; and that upon his arrival in London in April, 1921, he informed those two employees that the Russian company would no longer operate the London branch or continue to employ them, and that that branch, having long since ceased to carry on business in this country, was accordingly closed in April, 1921, and on January 30, 1923, as the result of certain communications which took place between a firm of accountants, who acted in some shape or form for the Russian company, and the Registrar of Companies, the Registrar came to the conclusion that the Russian company was no longer carrying on business in London, and marked the file at the Registry as being closed. On the other hand, evidence was adduced that in August, 1922, Mr. Ampenoff was himself at the London office sending remittances on account of dividends to shareholders of the Russian company in Paris, and writing to them on paper headed with the name of the Russian company

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and with a list of the directors, and signing those letters as director on behalf of the board; and, further, that on February 26, 1923, Mr. Ampenoff wrote on the same note-paper of the company, apparently as a director of the Russian company, to a shareholder of the company in regard to certain questions as to the conditions upon which shares in the company should be transferred. There was, besides, an affidavit by the plaintiff, filed on July 23, 1926, in which he deposed as follows: "The company is an extremely wealthy concern having assets within the jurisdiction of this honourable Court, and from time to time Mr. Ampenoff pays large sums of money in and from London by way of dividend to the shareholders, and I verily believe such distributions have been made in the years 1922, 1923 and 1924 respectively of 75*l.*, 65*l.* and 75*l.* per share of Rs.10,000, and that a further important sum per share was distributed, and my claim in this action is based upon the fact that in August, 1923, I became the holder of 10 shares of Rs.10,000 each by purchase from" a lady whom he mentioned.

On March 4, 1923, Mr. Sabatier wrote to the Council of Administration of the Russian company addressing his letter to 33 Eastcheap. Although letters similarly addressed appear to have reached Mr. Ampenoff as the representative of the Russian company only a few days before that date, yet Mr. Sabatier's letter failed to reach Mr. Ampenoff, though it reached the office in 33 Eastcheap, and was returned to the writer by a Russian gentleman writing from that address.

In order to enable counsel for the Russian partnership to contend that service of the writ on Mr. Ampenoff, as partner in or manager of the partnership, should be set aside on the ground that the partnership was non-existent, the Court, after argument, in exercise of its inherent jurisdiction, granted leave to amend the summons by making Mr. Ampenoff the applicant in place of the Russian partnership.

Luxmoore K.C. and *Dighton Pollock* for the defendants as applicants. In order to make service of the writ upon the Russian company effectual, it is essential to show that, at

the date of service—namely, April 20, 1926—the foreign company was carrying on a principal part of their business in this country, so as to make them resident in this country. The evidence shows that the company ceased to carry on any real or substantial business at the London branch in April, 1921, at the latest. Such business, if any, as Mr. Ampenoff was transacting at the London office, was no more one of the principal parts of the Russian company's business, so as to have the effect of making the company resident in this country, than the business which was transacted in London in the case of *Badcock* v. *Cumberland Gap Park Co.* (1) Ampenoff was not a person resident in the United Kingdom authorized to accept on behalf of the Russian company service of process within the meaning of s. 274 of Companies (Consolidation) Act, 1908, the company having long before the service of the writ ceased to have a place of business in London. The facts here fall short of the facts in *Actiesselskabet Dampskib "Hercules"* v. *Grand Trunk Pacific Ry. Co.* (2), where there was a London committee with a secretary and staff who had an office in London where they supervised the finance of the company; there, the paramount object of the company was to make and work a railway in Canada, and the company made contracts in this country for the purpose of raising loan capital, a purpose which was a part of the business of the company and necessary to carry out that paramount object. In Buckley on Companies, 10th ed., p. 554, it is stated: "A company incorporated in another jurisdiction, but not in this country, whose principal place of business is in another jurisdiction, but which has an office and assets in this country, may be wound up here, and the pendency of a foreign liquidation does not affect the jurisdiction of the Court to make a winding-up order. But there is no jurisdiction to wind up a company established in a foreign jurisdiction which has no office or branch or assets in this country, but which carries on business here by means of agents": *In re Lloyd Générale Italiano.* (3) It is not obligatory

(1) [1893] 1 Ch. 362. (2) [1912] 1 K. B. 222.
(3) (1885) 29 Ch. D. 219.

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upon a company which has traded here for several years, after having ceased to do so to continue to have a nominee on the register to represent it for all time. The penal sub-s. 5 of s. 274 cannot apply to a case where the company, having ceased to carry on business in this country, omits to keep on the file with the registrar the name of a person authorized to accept service of process.

D. N. Pritt for the plaintiff as respondent. It was held in *Employers' Liability Assurance Corporation* v. *Sedgwick, Collins & Co.* (1) that the writ was effectually served upon the nominee of the company under s. 274, notwithstanding that the company had long since ceased to carry on business in this country and the nominee had endeavoured without success to have his name removed from the register. The fact that the company is not carrying on business at the time of the service of the writ is not material, if the name of the person authorized to accept service remains on the register and has not been removed from it. It was the duty of this foreign company to bring itself within the jurisdiction of the Courts of this country by placing on the register the name of its agent to accept service of process. The Russian company is resident here: the evidence shows that it is really in existence, and fails to show that it is resident or carrying on business in any country except England. If the Court should hold there was no effectual service under s. 274, at any rate there was service within the meaning of Order IX., r. 8.

Luxmoore K.C. in reply. The facts in *Employers' Liability Assurance Corporation* v. *Sedgwick, Collins & Co.* (1) were different from those in the present case. There it was held that the foreign corporation had not been dissolved by the decree of the Soviet Government, while here the Russian company had long ceased to carry on business.

Cur. adv. vult.

Nov. 17. CLAUSON J. delivered a considered judgment in which, after stating the facts as above set out, he continued as

(1) (1926) 42 Times L. R. 749; since reported [1927] A. C. 95.

follows: I find on the facts that are in evidence before me that in 1923 the address in Eastcheap was a place at which Mr. Ampenoff was acting on behalf of the directorate of the Russian company, at all events whenever he found it convenient to do so. No place was suggested in evidence to which the activities of the directorate, which were exercised in 1923 at Eastcheap, had been transferred. I am not satisfied that any change has taken place. On the evidence before me I come to the conclusion that 33 Eastcheap is a place at which certain activities of the Russian company are being carried on—certain administrative activities—although there is no evidence of actual trading activities. I am not informed on the evidence of any other place than 33 Eastcheap, in any part of Europe, at which any administrative activities of the board of the Russian company are being carried on. In my opinion, the Russian company, on the evidence before me, must be held to be carrying on, at all events, the principal part of its business at this address in Eastcheap.

I was referred to the case of *Badcock* v. *Cumberland Gap Park Co.* (1), in support, apparently, of the proposition that mere administrative activities as opposed to trading activities do not suffice for the creation of a principal place of business. But that case does not assist me in the present case at all. There, the company which was in question was a company which was unquestionably carrying on active business and it was performing all its corporate duties and carrying out its corporate business activities in America. There was an office in this country at which certain things were being done, but in effect the learned judge in that case came to the conclusion that that office was nothing but a convenient agency for sending out circulars and prospectuses and was not in any real sense a place where the foreign company was carrying on its business. In the present case, no other place being suggested in the evidence as the place at which the Russian company is carrying on its activities, I feel driven to the conclusion that it is carrying on such

(1) [1893] 1 Ch. 362.

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activities as do exist at the address at Eastcheap to which I have referred.

I will now pass away for a moment from the position of the Russian company in order to deal with the position of the Russian partnership. It appears that there is an entry on the register kept under the Business Names Act of this Russian partnership as carrying on business in London at Eastcheap, with particulars as to its partners, which seem to include the names of all the shareholders in the Russian company. It is clear on the evidence, as it stands, that there is no such partnership at all. There is the Russian company. Everybody agrees that the Russian company was effectively formed. The Russian company took over a former partnership, which ceased many years ago. There is in existence—and I do not think this is really disputed—no such partnership as that which appears on the register kept under the Business Names Act. It would appear that the plaintiff named the Russian partnership as the second defendant to this action ex abundanti cautela, lest it should be held that the first defendant, the Russian company, was not an incorporated company, but was rather in the nature of a partnership. The entry under the Business Names Act is well explained by the evidence before me. I need not go into it at length. It is quite obvious that the registration under the Business Names Act was a mere error, and should never have been made. Further, in my view, the Russian partnership as sued in this section does not exist, never has existed, and should never have been made a defendant.

The question then arises as to whether Mr. Ampenoff, or the solicitors who acted under his instructions, ought ever to have entered an appearance for the Russian partnership, in view of the fact that it does not exist; and, as the point that the Russian partnership was non-existent was intended to be made and was one which the Court ought to give an opportunity for the parties concerned to deal with, I gave leave, on the application of Mr. Luxmoore, who was appearing on the instructions of the solicitors who had entered an appearance for the Russian partnership, for the amendment

of the summons which had been taken out by the Russian partnership, and allowed it to be turned into a summons by Mr. Ampenoff for an order that service of the writ upon Ampenoff as manager of the Russian partnership and also as a partner in the firm might be set aside.

Now on this summons, as so amended, I think the right order to make is to set aside the service, and at the same time to order the name of the Russian partnership to be struck out of the writ and other proceedings in this action. There will be no order as to the costs of this summons or of the amendment of it.

I now turn back to the Russian company, and I have to see what the legal result is of the facts as I find them to be. Having regard to the facts as I have stated them, I am of opinion that at the time of the service of the writ in this matter on Mr. Ampenoff the Russian company was, in the language used by Buckley L.J. in the *Grand Trunk Pacific Ry.* case (1), found within the jurisdiction; that is to say, the Russian company was here for the purpose of the service of a writ. If I am right in this view, the Russian company could have been properly served with the writ under Order IX., r. 8, by service on the head officer, clerk, treasurer or secretary of that company. It is, however, to be observed that the plaintiff did not in fact attempt to serve the Russian company under this Order, but as appears from the notice on the writ served on Mr. Ampenoff, as representing the Russian company, he sought to bind the Russian company by serving the writ on Mr. Ampenoff, as being a person named under s. 274 of the Companies (Consolidation) Act, 1908, by the Russian company. It becomes, therefore, necessary to consider whether that section, on its true construction, enabled such service to be effectively made upon the company in the circumstances of the case.

Sect. 274 deals with every company incorporated outside the United Kingdom which establishes a place of business within the United Kingdom and where in that section the expression "company to which this section applies" is

(1) [1912] 1 K. B. 222, 227.

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found I must, I think, read for the expression the words "company which establishes a place of business within the United Kingdom." The result appears to me to be that, if a foreign company has once established a place of business in the United Kingdom, it remains its duty under the section, even if it ceases to carry on business at the place of business so established, to keep upon the register the name and address of a representative in the United Kingdom authorized to accept on behalf of the company service of process required to be served upon the company. In this particular case I find that the Russian company, having established its place of business, placed Mr. Ampenoff's name on the register as a person authorized to accept process. It is true that the registrar has been informed that the company no longer carries on business here, and it is true that the registrar has marked the file as being closed. It appears to me, however, that, whether or not the Russian company still had at the date of the service a place of business in this country, Mr. Ampenoff remains the person authorized by the company under the section to accept service of process. If the fact be, as, in my opinion, it is, that the company still operates in this country, it would seem to be reasonably free from doubt that Mr. Ampenoff still remains a person authorized by reason of the section to accept service of process on behalf of the company. Accordingly process served on him is sufficiently served upon the company.

It was, however, strenuously argued before me that s. 274 is of no assistance to the plaintiff in the existing circumstances. It was argued that the section has no application to a company, though it may have established a place of business in this country, if it has abandoned that place of business and no longer carries on business in this country. My view of the facts makes it, strictly speaking, unnecessary for me to deal with the point, but as the point was argued at length, I will proceed to deal with it. The argument, as I understand, went upon the ground that the section cannot be read quite literally, that the section cannot go so far as to mean that a notice addressed, for instance, to a person who has been

named under the section but has died can be sufficient service upon the company; and that reading the section as a whole, it must be understood to apply only to a company which, having established a place of business in this country, continues to have such a place of business. For my own part I cannot accept that construction of the section. My view of the section is that, so far as is material for the present purpose, the section must be read literally, and that if once a company has established a place of business here, it remains bound, even if it ceases to carry on business here, so long, at all events, as the name of a nominee, placed on the register under s. 274, sub-s. 1 (*c*), remains on the register. It is true that the section operates somewhat artificially. But a company formed under the Companies Act in England cannot escape liability to be served with process at its registered office, even if it ceases to carry on business here. It is its duty to have a registered office here (see s. 62), and, if it fails to do so, it can be fined. Similarly, it is the duty of a foreign company which has once established itself here, to have a nominee on the register, and failure so to do involves a fine. The only difference is that in the case of a foreign company it may be more difficult to enforce the penalty. I find it difficult to reconcile the construction suggested on behalf of the Russian company with the views taken of the section by the Court of Appeal and by at least three of the learned Lords advising the House of Lords in the case of *Employers' Liability Assurance Corporation* v. *Sedgwick, Collins & Co.* (1) From the report of that case before the Court of Appeal, under the name of *Sedgwick, Collins & Co.* v. *Rossia Insurance Co. of Petrograd* (2), I find that Bankes L.J. takes the view that a person, whose name has been put upon the file under s. 274 as representing the company, cannot himself remove his name from the file. It must remain there with, I suppose, the statutory result, that service on him is good service on the company. Scrutton L.J. assumes that the foreign company, which has, under s. 274, nominated, while carrying on

(1) 42 Times L. R. 749; since reported [1927] A. C. 95.
(2) [1926] 1 K. B. 1.

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business in the jurisdiction, an agent to accept service, would be bound by service on that agent, even after ceasing to carry on business in the jurisdiction, though it is true that the same Lord Justice observes that the section may sometimes operate unreasonably. Sargant L.J. is of opinion that the person named to accept service cannot disclaim his position so as to affect the position of creditors in this country, and points out that, were it not so, a foreign company desirous of doing business in this country, might at its convenience escape subjection to service of process by removing its nominee's name from the register or instructing him to disclaim it. In the House of Lords—and it will be appreciated that I have not at present the advantage of being able to refer to the judgments of their Lordships in the authorized reports—the Lord Chancellor expresses the opinion that a foreign company which has put upon the file the name of a person authorized to accept on its behalf service of any process thereby submits to the jurisdiction of the English Courts, and will be bound by the service, and his Lordship does not see any difficulty in the foreign company there in question being bound by service on their nomineee long after they have ceased to carry on business in this country. Lord Sumner indicates the view that the presence of the name of the foreign company's nominee on the register without alteration involves the validity of service upon him, and Lord Parmoor expressly states that so long as the nominee's name remains on the register service on him is equivalent to service on the foreign company, and the foreign company remains liable to the territorial jurisdiction of the English Court. Questions no doubt were raised in the House of Lords as to whether such service would be recognized in the domicil of the foreign company as sufficient, but I do not understand that any of the three learned Lords whom I have mentioned saw any difficulty in service on the nominee being good service on the foreign company, even if the foreign company had ceased to have any place of business within this jurisdiction.

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It follows that, in the view which I take of the construction of s. 274, the service of the writ in this matter on Mr. Ampenoff was effective service upon the Russian company, even if I am wrong in my view that, at the time of the service, the Russian company was still to be found within the jurisdiction.

I deal therefore with the summons by the Russian company against the plaintiff by dismissing it, the costs of each party of that summons to be costs in the action.

Solicitors for the applicants : *Gilbert Samuel & Co.*

Solicitors for the respondents : *Guedalla, Jacobson & Spyer.*

H. C. H.

ASTBURY J.
1927
Feb. 15, 16, 17.

In re RYDER AND STEADMAN'S CONTRACT.

[1926. R. 2644.]

Law of Property—Transitional Provisions—Undivided Shares—Entirety subject to Jointure—Whether settled Land—Statutory Trusts—In whom vested—Overreaching Effect—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20) *—Sch.* 1, *Part* 4, *s.* 1, *sub-ss.* 2, 3 *—Settled Land Act*, 1925 (15 *Geo.* 5, *c.* 18), *s.* 1, *sub-s.* 1, *cl. v., sub-s.* 7*—Law of Property (Amendment) Act*, 1926 (16 *&* 17 *Geo.* 5, *c.* 11), *s.* 1, *sub-ss.* 1, 2 (*b*); *Schedule.*

On December 31, 1925, Blackacre, then admittedly not settled land, was vested in the three vendors in fee simple in possession as tenants in common in equal shares subject to an old jointure appointed in 1869 but with a full indemnity therefor.

On February 13, 1926, the three vendors contracted to sell Blackacre to the purchaser, subject to the jointure, but with the benefit of the indemnity.

The vendors contended that Blackacre "not being settled land" immediately before January 1, 1926, when the Law of Property Act, 1925, came into operation had vested in them, subject to the jointure, as joint tenants on the statutory trusts for sale, etc., under the transitional provisions of Sch. 1, Part 4, s. 1, sub-s. 2.

The purchaser, on the other hand, contended that on January 1, 1926, owing to the jointure, Blackacre became momentarily settled land under the Settled Land Act, 1925, s. 1, sub-s. 1, cl. v., and therefore under the Law of Property Act, 1925, Sch. 1, Part 4, s. 1, sub-s. 3, vested on the statutory trusts in the trustees of the compound settlement constituted by the jointure deed and other deeds, or if there were no such trustees in the other persons therein mentioned. The fact that immediately on such vesting Blackacre became subject to the statutory trusts for sale, etc., under sub-s. 3 and therefore s. 1 of the

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Settled Land Act no longer applied (see sub-s. 7) did not affect the vesting that had taken place the moment before:—

Held, that Blackacre had vested on the statutory trusts in the compound settlement trustees (existing or to be appointed) under the Law of Property Act, 1925, Sch. 1, Part 4, s. 1, sub-s. 3, and not in the three vendors under sub-s. 2.

Held, also, that a sale under the statutory trusts must necessarily overreach the jointure, and could not be made subject thereto.

VENDOR AND PURCHASER SUMMONS.

In April, 1924, under and by virtue of a resettlement of July 14, 1866, a marriage settlement of November 6, 1869 (appointing a jointure of 2500*l.* per annum to the wife for life and a term of 1000 years to secure it), a marriage settlement of July 19, 1897, and a disentail of March 10, 1920, certain freehold estates, including Blackacre, stood limited (subject to the 2500*l.* jointure and term) to such uses as the Duke of Marlborough and the Marquess of Blandford should jointly appoint.

By a conveyance on sale dated April 14, 1924, the Duke of Marlborough and the Marquess of Blandford appointed Blackacre to the three vendors in fee simple as tenants in common in equal shares subject to the jointure but with an indemnity therefor.

By a contract dated February 13, 1926, the three vendors agreed to sell Blackacre to Mrs. Steadman for 1700*l.* subject to the jointure but with the benefit of the indemnity, so that the price was not affected by the jointure. The title was to commence with the settlement of July 19, 1897.

The investigation of title proceeded at first smoothly, but on October 26, 1926, the purchaser delivered a requisition to the following effect:—

"The property sold was by the conveyance of April 14, 1924, conveyed to the vendors as tenants in common subject to but indemnified against the 2500*l.* jointure rentcharge secured by the marriage settlement of November 6, 1869. The property therefore became settled land within the Settled Land Act, 1925 (see s. 1, sub-s. 1, cl. v.), and was therefore settled land within the Law of Property Act, 1925 (see s. 205, sub-s. 1, cl. xxvi.).

It is submitted therefore (*a*) that by virtue of the transitional provisions of the Law of Property Act, 1925, Sch. 1, Part 4, s. 1, sub-s. 3 (as amended by the 1926 Act Schedule), the entirety of the property sold being settled land and being held under one and the same settlement vested in the trustees (if any) of the settlement as joint tenants upon the statutory trusts; or if there were no such trustees at the commencement of the Law of Property Act, 1925, then in the Public Trustee upon the same trusts (see sub-s. 3, proviso i.); (*b*) that the proper persons to convey are the settlement trustees (if any) or if none the Public Trustee if requested and willing to act, or trustees to be appointed in his place by the vendors; such trustees respectively conveying in execution of the statutory trusts; (*c*) that the purchaser will not obtain a good receipt for her purchase money unless it is paid to or by the direction of the proper conveying parties as last aforesaid.

The purchaser therefore requires to be satisfied (*a*) as to what instruments constitute the settlement to which the property became subject at the commencement of the Law of Property Act, 1925. The settlement would appear to be a compound settlement consisting of: (1.) the resettlement of July 14, 1866; (2.) the marriage settlement of November 6, 1869; (3.) the marriage settlement of July 19, 1897, with the subsequent disentail of March 10, 1920; and (4.) the conveyance of April 14, 1924, to the three vendors as tenants in common.

The purchaser requires to be satisfied (*b*) either (1.) as to who were the trustees of this settlement at the commencement of the Law of Property Act, 1925, or (2.) of the fact that there were none, and (*c*) if none either (1.) of the Public Trustee's acceptance of the trust or (2.) of a valid appointment by the vendors of trustees in his place."

On December 13, 1926, the vendors, who contended that on January 1, 1926, Blackacre vested in them as joint tenants upon the statutory trusts, under Sch. 1, Part 4, s. 1, sub-s. 2, and that they were now the estate owners with power to convey subject to the jointure and to give a proper receipt

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for the purchase money, issued this summons for a declaration that the requisition had been sufficiently answered and a good title shown.

Walter Banks for the three vendors. Land can no longer be held in undivided shares: Law of Property Act, 1925, s. 1, sub-s. 6; s. 34. It was therefore necessary to have "transitional" provisions for land so held before January 1, 1926. These are provided by s. 39 and Sch. 1, Part 4, which subject such land to the statutory trust for sale under s. 35, so that, whatever it was before the Act, Blackacre can no longer be settled land.

The question who is to exercise these trusts is determined by Part 4, s. 1, sub-ss. 1 to 4. In the present case the choice lies between sub-s. 2, which applies to non-settled land, and sub-s. 3, which applies to settled land. Now here Blackacre was admittedly non-settled land before the Acts, and that is what the "transitional" sub-sections obviously refer to. The words "where immediately before the commencement of the Act" govern all the sub-sections. Even if the definitions of the new Acts are applied, it makes no difference. It is true that Blackacre if held by a single owner would, owing to the jointure, have become settled land under the Settled Land Act, 1925, s. 1, sub-s. 1, cl. v., but under the new sub-s. 7 added by the Law of Property (Amendment) Act, 1926, Schedule (1926 Statutes, p. 60), this section does not apply to land held on trust for sale, which is the case with Blackacre, under Part 4. It is clear therefore that the case falls within sub-s.2, and the vendors hold Blackacre on the statutory trusts.

The legal estate vested automatically in the vendors under Sch. 1, Part 2, s. 6 (*b*), and they became estate owners subject to the paramount jointure, whose priority is preserved by Part 2, s. 7 (*h*), and s. 8. The overreaching provisions of the Law of Property Act, 1925, s. 2, sub-s. 1 (ii.), do not apply.

Even if the Settled Land Act, 1925, could be dragged into this case the vendors would be estate owners with life-

tenant powers under s. 20, sub-s. 1, cl. ix., and could sell subject to the jointure under the Law of Property (Amendment) Act, 1926, s. 1, sub-s. 2 (*b*), and the purchaser could resell subject thereto under s. 1, sub-s. 1.

Hubert Rose for the purchaser. The transitional provisions clearly cannot be applied before January 1, 1926, and the question is what they mean on that date. The words " settled land " must surely include the new definitions, which are the same in both Acts: Wolstenholme & Cherry's Conveyancing Statutes, 11th ed., p. 503; Law of Property Act, 1925, s. 205, sub-s. 1, cl. xxvi.; Settled Land Act, 1925, s. 117, sub-s. 1, cl. xxiv.

The transitional vesting provisions of the latter Act contained in Sch. 2, para. 1, do not apply to settled land held at law or in equity in undivided shares vested in possession: see s. 5. That case is left to be dealt with by the Law of Property Act, 1925, Sch. 1, Part 4.

Now Part 4 and the Settled Land Act, 1925, came into operation at the same moment, and at that moment Blackacre had become settled land under the Settled Land Act, 1925, s. 1, sub-s. 1, cl. v. That brought the case within Part 4, s. 1, sub-s. 3. The fact that the next moment it became subject to a trust for sale and so became non-settled land is not really material on this point. It had already vested in the settlement trustees, the Public Trustee, or other persons under sub-s. 3. That really disposes of the case.

As to the subsidiary points. The jointure can clearly be overriden by a sale under the statutory trusts: Wolstenholme & Cherry's Conveyancing Statutes, 11th ed., pp. 190, 507. This is borne out by the Law of Property Act, 1925, s. 28, sub-s. 1, which gives life-tenant powers to trustees for sale, and by the overreaching provisions of s. 72 of the Settled Land Act, 1925. As therefore the persons exercising the statutory trusts are capable of overreaching the jointure they are compelled to overreach it under the Law of Property Act, 1925, s. 2, sub-s. 1 (ii.), and cannot sell subject thereto. Sub-s. 2 has no application to this case, and sub-s. 4 merely preserves the jointress's remedies under s. 90: see

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Wolstenholme & Cherry's Conveyancing Statutes, 11th ed., p. 154.

The Settled Land Act, 1925, s. 20, sub-s. 1, cl. ix., and the 1926 Amendment Act, s. 1, sub-ss. 1, 2 (*b*), do not apply to land held on the statutory trusts: see also s. 36, sub-s. 6.

The vendors' construction would give rise to curious anomalies. For instance one married woman's estate in fee simple with a restraint on anticipation would become settled land. But if two women held such an estate as tenants in common they could sell it under Part 4, s. 1, sub-s. 2, and give a good receipt for the purchase money; which is absurd.

Walter Banks in reply. They would hold the purchase money subject to the restraint on anticipation.

The moment of time cannot really be divided as suggested. Part 4 and the Settled Land Act, 1925, come into operation simultaneously. The purchaser really assumes that the Settled Land Act operates first, though only for an infinitesimal moment. But why should not Part 4 operate first and create the trust for sale? In that case Blackacre would not be settled land within the new definition. The crucial note in Wolstenholme & Cherry's Conveyancing Statutes, 11th ed., p. 503, was written before sub-s. 7 was added to s. 1 of the Settled Land Act, 1925.

The whole difficulty would be avoided by reading "settled land" as referring to land that was settled land immediately before January 1, 1926. That is on the face of it the obvious construction, but if there is really any ambiguity the Court should be slow to give the words a meaning that deprives landed proprietors of their property. That is surely a greater anomaly than a construction which merely enables married women holding land as tenants in common in fee simple with a restraint on anticipation to sell and hold the purchase money as joint tenants subject to the same restraint.

ASTBURY J. [after stating the facts:] The requisition of October 26, 1926, came no doubt as a bombshell upon the three vendors, who up to that time had thought they were

absolute owners in possession of Blackacre subject to the jointure and able to sell it subject thereto and to receive the purchase money. The case raises an extremely difficult and complicated point. There is no doubt that it is a matter of great hardship to the vendors if the purchaser is right, but my only duty is to unravel the difficult knot. As the case may go further I had better state the respective contentions, beginning with those of the three vendors.

The contract was dated about six weeks after the new legislation came into operation. How far the draftsman considered that legislation I do not inquire. Before the commencement of the Law of Property Act, 1925, the vendors were tenants in common in fee simple of Blackacre subject to the jointure, and I have to consider how their position was altered by that Act.

By s. 1, sub-s. 6, a legal estate is not capable of subsisting in an undivided share in land, and s. 39 provides that for the purpose of effecting the transition from the previous law the provisions in Sch. 1 shall have effect for subjecting land held in undivided shares to trusts for sale.

Schedule 1, Part 4, is headed "Provisions subjecting land held in undivided shares to a trust for sale," and those provisions obviously apply to all land so held.

Part 4, s. 1, provides that where, "immediately before the commencement of this Act," land is held at law or in equity in undivided shares vested in possession, "the following provisions shall have effect."

Sub-s. 2 provides that if the entirety of the land "not being settled land" is vested absolutely and beneficially in not more than four persons of full age entitled thereto in undivided shares free from incumbrances affecting undivided shares, but "subject or not to incumbrances affecting the entirety," it shall, by virtue of this Act, vest in them as joint tenants upon the statutory trusts.

Sub-s. 3 as amended provides that "if the entirety of the land is settled land" (whether subject or not to incumbrances) held under one and the same settlement, it shall vest free from incumbrances not secured by a legal mortgage in the

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trustees (if any) of the settlement as joint tenants upon the statutory trusts, and (if none) in the Public Trustee or other persons therein mentioned on the same trusts.

The vendors' main point is that the phrase "not being settled land" in sub-s. 2 ought to be read "not being settled land immediately before the commencement of the Act." The purchaser, on the other hand, contends that though the property must be held in undivided shares "before the commencement of this Act" in order to bring Part 4 into operation at all, the provisions of Part 4 once in operation apply as and from the commencement of the Act. In other words, she says that the expression "settled land" means "settled land within the meaning of this Act."

If the vendors are right, Blackacre, not being settled land immediately before the commencement of the Act, is vested in them as joint tenants upon the statutory trusts, namely (s. 35) upon trust to sell the same and to stand possessed of the net proceeds "upon such trusts, and subject to such powers and provisions, as may be requisite for giving effect to the rights of the persons (including an incumbrancer of a former undivided share or whose incumbrance is not secured by a legal mortgage) interested in the land."

Schedule 1, Part 2, s. 6 (*b*), provides that where the land is at the commencement or by virtue of this Act or any Act coming into operation at the same time subject to a trust for sale, the legal estate affected shall vest in the trustees for sale, but "subject to any mortgage term subsisting or created by this Act." In this case the jointure term is not a mortgage term subsisting or created by this Act.

Part 2, s. 8, provides that any legal estate acquired by virtue of this Part of this Schedule shall be held upon the trusts and subject to the powers, provisions, rents, covenants, conditions, rights of redemption (as respects terms of years absolute) and other rights, burdens and obligations, if any, "upon or subject to which the estate acquired ought to be held." The vendors rely on this section.

The vendors and purchaser both admit that under certain sections of the Settled Land Act, 1925, as amended, which

I need not read, land ceases to be settled land as soon as it is held on the statutory trusts.

The vendors say that they now hold Blackacre on the statutory trusts under Part 4, s. 1, sub-s. 2. The purchaser, on the other hand, says that it is held under sub-s. 3 by the compound settlement trustees existing or to be appointed.

The vendors' main contention is that Blackacre not being settled land before the commencement of the Act vested in them under sub-s. 2 upon the statutory trusts. They say that they have life-tenant powers conferred on them by the Settled Land Act, 1925, s. 20, sub-s. 1, cl. ix., and as estate owners of Blackacre subject to the jointure can convey subject thereto under the Law of Property (Amendment) Act, 1926, s. 1, sub-s. 2 (*b*), and that their purchaser if she completes will be able to resell and complete subject to the jointure under s. 1, sub-s. 1. I do not, however, think that those provisions apply to land held upon the statutory trusts.

The vendors rely on Sch. 1, Part 2, ss. 6 (*b*) and 8, and contend that they hold the legal estate vested in them on the statutory trusts subject to all burdens subject to which it ought to be held. If those burdens include the jointure they would be right, but for reasons given later I do not think it is included.

The vendors further say that the jointure was always secured by a term paramount to their interest in Blackacre, and its priority is therefore preserved by Sch. 1, Part 2, s. 7, which provides that nothing in this part of this Schedule shall operate (*h*) to affect prejudicially the priority of any mortgage or other incumbrance or interest subsisting at the commencement of this Act. They use that clause to enforce their contention that the legal estate, if vested in them under Part 4, s. 1, sub-s. 2, could not be sold under the statutory trusts so as to prejudice the jointure, but could only be sold subject thereto.

The vendors' argument really turns on their construction of Part 4, s. 1, sub-s. 2. Unless they are right on that, the rest of their argument does not assist them. Now as to the

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meaning of "settled land" in sub-ss. 2 and 3, I desire to point out that, though not binding on me, the opinion of Sir Benjamin Cherry, who was largely concerned in framing these statutes, is very clearly expressed in Wolstenholme & Cherry's Conveyancing Statutes, 11th ed., p. 503, where he says: "As to what is 'settled land': Settled Land Act, 1925, ss. 1, 2, 3; for the purposes of this paragraph, it includes land held by an absolute owner subject to family charges." But land subject to charges of this character was only as such made settled land by the Settled Land Act, 1925. It was not settled land under the former Acts. It is clear, therefore, that Sir Benjamin Cherry treats the words "settled land" in sub-ss. 2, 3 as including what is settled land under the new Acts.

It cannot be denied that there is some difficulty or ambiguity in the language of Part 4 in this respect. The expression "not being settled land" occurs constantly in the Act, and the intention of the 1926 Amendment Act, coupled with the Settled Land Act, 1925, was to give a clear and definite meaning to this and other technical expressions. Reading Part 4 as a whole, the words "settled land" in s. 1, sub-ss. 2, 3, may be construed in two ways: (1.) as referring to land that was settled land immediately before the commencement of the Act; or (2.) as including land that became settled land on Part 4 and the Act coming into operation, "when the following provisions shall have effect."

There is difficulty in either construction, but on the whole I think the second is right, being in accordance and throughout consistent with the policy of the Act, whose common object is in no particular interfered with.

The vendors' construction, on the other hand, would give rise to many difficulties. It would no doubt be convenient to them to be able to sell Blackacre subject to the jointure, but it would be contrary to the spirit of the Act.

Again, take the case of two married women tenants in common in fee simple with a restraint on anticipation before the Act. Though this would become settled land under the Settled Land Act, 1925, the vendors say that it would vest

in them as joint tenants upon the statutory trusts under sub-s. 2. This cannot have been the intention of the Act.

The purchaser rightly contends, as I have already stated, that s. 20, sub-s. 1, cl. ix., of the Settled Land Act, 1925, and the amendments thereto do not apply where the land is held on the statutory trusts. Here it is clearly so held, and the only question is who are the holders, and what they can do with it.

As to Sch. 1, Part 2, s. 8, which the vendors say enables them to sell subject to the jointure, the purchaser rightly replies that the legal estate acquired under Part 2, s. 6, is to be held upon the trusts and subject to the burdens upon or subject to which it ought henceforth to be held. That argument is enforced by Part 4, s. 1, sub-s. 8, which provides that " This Part of this Schedule does not (except where otherwise expressly provided) prejudice incumbrancers whose incumbrances affect the entirety of the land at the commencement of this Act, but (if the nature of the incumbrance admits) the land shall vest in them for legal terms of years absolute in accordance with this Act but not so as to affect subsisting priorities."

As to this sub-section Sir Benjamin Cherry says (loc. cit., p. 507): " ' Except where otherwise expressly provided ' ; only legal mortgages are paramount to the trust for sale. If a legal mortgage term is not created, the charge on the entirety, being an equitable charge, is shifted to the proceeds of sale, and effect will be given thereto under the statutory trusts : s. 35. This is in accordance with the principle in s. 2, under which an equitable charge is overreached by means of a trust for sale."

That note is accurate and is borne out by s. 35, which defines statutory trusts shortly as a trust for sale, the net proceeds to be held upon the trusts " requisite for giving effect to the rights of the persons (including an incumbrancer of a former undivided share or whose incumbrance is not secured by a legal mortgage) interested in the land." Sir Benjamin Cherry (loc. cit., p. 190) rightly says : " The words in brackets have special reference to Sch. 1, Part 4,

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as incumbrancers of these classes have to be satisfied with charges on the proceeds of sale." The present jointure is an incumbrance of that class.

The next question is whether a sale under the statutory trusts can be made subject to the jointure. The vendors say it can; but the general intention of the Legislature in these Acts is against them.

The Law of Property Act, 1925, s. 2, sub-s. 1, provides that a conveyance to a purchaser of a legal estate in land shall overreach any equitable interest or power affecting that estate, whether or not he has notice thereof, if (ii.) the conveyance is made by trustees for sale and the equitable interest or power is at the date of the conveyance "capable of being overreached by such trustees" under the provisions of sub-s. 2 of this section or independently of that sub-section. In other words it is not what the trustees desire to do but what they are capable of doing that determines the question of overreaching.

Sect. 28, sub-s. 1, provides that trustees for sale have all the powers of a life-tenant and Settled Land Act trustees.

Sect. 72, sub-s. 2, of the Settled Land Act, 1925, provides that the life-tenant's conveyance "to the extent and in the manner to and in which it is expressed or intended to operate and can operate under this Act, is effectual to pass the land conveyed . . . . discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, but subject to and with the exception of (i.) all legal estates and charges by way of legal mortgage having priority to the settlement; and (ii.) all legal estates and charges by way of legal mortgage which have been conveyed or created for securing money actually raised at the date of the deed."

The present jointure falls within neither exception, so that it is capable of being overreached by a conveyance under the statutory trusts. The persons exercising those trusts are therefore obliged to overreach it and cannot convey subject thereto.

This view is perhaps corroborated by the following consideration. Under the 1926 Amendment Act the word "mortgage" is substituted for "term of years absolute" in Sch. 1, Part 4, s. 1, sub-s. 3. This may have been done to remove any misconception that a jointure secured by a term of years absolute would not be overridden by a sale under the statutory trusts, and it is interesting to note that this amendment expressly brings the law into harmony with Sir Benjamin Cherry's view (loc. cit., p. 507).

I do not think I could have made the matter any clearer if I had reserved judgment. There is no doubt that in this particular case the Acts have worked a very serious hardship on the vendors. They are prevented from selling their land unless they comply with the statutory formalities, and even if they find or appoint compound settlement trustees to sell, they cannot receive the purchase money during the jointress' life. The result, however, is that up to the present the vendors have not shown a good title, and the summons must be dismissed with costs.

Solicitors: *Stow, Preston & Lyttelton, for Andrew Walsh & Bartram, Oxford; Steadman, Van Praagh & Gaylor.*

G. R. A.

CLAUSON J.

1926
Nov. 18.

In re WALERAN SETTLED ESTATES.

[1926. W. 1729.]

Settled Land—Person having Powers of Tenant for Life—Trust during Continuance of Term to Pay Income of Land to one during her Life—Vesting Deed—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *ss.* 19, 20, *sub-s.* 1 (viii.).

Under a settlement, dated September 13, 1906, lands stood limited, in the events which happened, to the use of trustees for a term of ninety-nine years, if C. should so long live, upon trust to pay the rents and profits thereof to C. during the remainder of her life and, subject to the term and the trusts thereof, to the use of W. during his life, with remainders over :—

Held, that C. was a person entitled to the income of the settled land during her life, until the determination of her interest by means of the expiration of the term and that, consequently, she was a person having the powers of a tenant for life within the meaning of s. 20, sub-s. 1 (viii.), of the Settled Land Act, 1925.

ORIGINATING SUMMONS.

By a settlement, dated September 13, 1906, and made between the Right Hon. the first Baron Waleran of the first part, George Coats of the second part, and trustees thereof of the third part, Baron Waleran conveyed to the trustees the manor, mansion house and lands known as "the Bradfield Estate," to hold the same unto the trustees and their heirs, as to certain specified parts thereof to the use of the Baron during his life, and subject thereto, as to the whole of the said estate to the use of the trustees, their executors, administrators and assigns for the term of ninety-nine years if the Hon. Lionel Walrond (who was the only surviving son of the Baron) and Charlotte, his wife, or the survivor should so long live upon the trusts thereinafter declared, and from and after the expiration or determination of the term, and in the meantime subject thereto and to the trusts thereof, to the use of William George Hood Walrond (the infant son of Lionel Walrond and Charlotte, his wife) during his life, with remainder to the use of the first and every other son of William George H. Walrond successively in tail male, with divers remainders over. The trusts of the term were that the trustees should (subject to the life

estate of the Baron) enter into possession on receipt of the rents and profits of the Bradfield Estate and should during the continuance of the term continue in such possession or receipt and manage the same with the same powers in that behalf as if they were in such possession or receipt during the minority of an infant tenant in tail and should keep and maintain the mansion house and the grounds thereof in a proper state for occupation and should during the joint lives of the Hon. Lionel Walrond and the Hon. Charlotte Walrond, his wife, pay one moiety of the net rents and profits to Lionel Walrond and the other moiety to his wife, and in the event (which happened) of Charlotte, his wife, surviving her said husband, pay the whole thereof to her during the remainder of her life, and it was agreed that the trustees might, with the consent of George Coats and after his death if required by Lionel and his said wife or by the survivor of them so to do, permit them to occupy and enjoy rent free the mansion house and grounds.

In or about the year 1906, the Hon. Lionel Walrond and his wife were let into possession by the trustees of the settlement of the mansion house and grounds, which continued to be occupied by them until the death of Lionel Walrond, and since his death down to the present time by his widow.

On November 2, 1915, Lionel Walrond died, and on June 7, 1920, his widow married Henry W. A. Adams. On May 17, 1925, Baron Waleran died, and his grandson, William George Hood Walrond, thereupon became the present Baron Waleran, and on March 29, 1926, attained the age of twenty-one years.

This summons was taken out by the Hon. Mrs. Adams under s. 93 of the Settled Land Act, 1925, for a declaration that she was a person having the powers of a tenant for life under the settlement and asking that the trustees might be directed to execute a vesting deed of the settled land in her favour.

C. P. Sanger for the plaintiff, the Hon. Mrs. Adams. The plaintiff is a person beneficially entitled to possession

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of the settled land during her life within the meaning of s. 19, sub-s. 1, of the Settled Land Act, 1925, and therefore is tenant for life thereof for the purposes of that Act. Although s. 19 is concerned with freehold interests and not with chattels real, yet the plaintiff is entitled in substance for her life. It has been decided that, where land has been conveyed to the use of feoffees for eighty years, if B. should so long live, with remainders over after the death of B. to D. in tail, the remainders after the death of B. were not contingent, but vested, upon the ground that the chance of B.'s death taking place after the determination of the eighty years term was so exceedingly small that the remainders were to be considered as vested and the possibility that a life in being might endure for eighty years to come does not amount to a degree of uncertainty sufficient to constitute a contingent remainder: Fearne on Contingent Remainders, 10th ed., vol. i., p. 21; *Napper* v. *Sanders*. (1) If the legal estate in the term were in the plaintiff, she would have the powers of a tenant for life, as a tenant for years determinable on life within s. 20, sub-s. 1 (iv.): but here the legal estate is in the trustees. But however that may be, the plaintiff is a person having the powers of a tenant for life under s. 20, sub-s. 1 (viii.), of the Act (2), the means by which her life interest is determinable, are by the expiration of the term during her lifetime.

John Bradley Dyne for the trustees.

Henry Johnston for the defendant William George Hood Walrond, the present Baron Waleran. This defendant is the tenant for life of the settled lands subject to the term. True, he is not in possession, but he must be deemed to be a tenant for life within the meaning of s. 19 of the Settled

(1) (1631) Hutt. 118.

(2) Sect. 20, sub-s. 1 (viii.), of the Settled Land Act, 1925: "A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether or not subject to expenses of management or to a trust for accumulation of income for any purpose, or until sale of the land, or until forfeiture, cesser or determination by any means of his interest therein unless the land is subject to an immediate binding trust for sale."

Land Act, 1925, notwithstanding the term in the settled lands which preceded the estate for life, that term being in the nature of an incumbrance upon the settled land. Mrs. Adams has not the powers of a tenant for life under s. 20, sub-s. 1 (viii.), of the Act, since her interest is not a freehold interest with which that sub-section is concerned, but is only a chattel interest.

CLAUSON J. In the circumstances of this case the plaintiff, Mrs. Adams, has, in my judgment, succeeded in bringing herself within s. 20, sub-s. 1 (viii.), of the Settled Land Act, 1925, in other words, she has succeeded in showing that she is a person entitled to the income of land under such a trust as that which is set out in sub-cl. viii. of that sub-section. For that purpose it is not, in my opinion, essential that the trust should have been framed so as to follow slavishly the form of the trust or direction stated in sub-cl. viii.; that is to say, it is not necessary that the trust should take the form of a trust to pay the income of the settled land to a beneficiary during his life, until the determination of his interest by the particular means indicated—in the present case, by the expiration of the term of years. It is sufficient to bring a case within the sub-clause, if the trust be so framed (as in the present case it is) as to entitle a person during a fixed term of years, if he should so long live, to receive the income of the land. By virtue of the trusts of the term vested in the trustees Mrs. Adams is a person entitled to the income of the land until the determination of her interest by means of the term expiring during her lifetime. The means by which the interest may be determined are in no respect restricted—the words in the sub-clause being, "determination by any means"—and are wide enough to include the determination of the interest by means of the effluxion of the term during the lifetime of Mrs. Adams. The trusts declared by the settlement in her favour are, in my opinion, but a reproduction in substance, although in a somewhat different form, of the trust stated in sub-cl. viii. Her interest under the settlement trusts

CLAUSON J. 1926 WALERAN SETTLED ESTATES, *In re.*

is neither greater nor less, but an equivalent of the interest she would have taken if those trusts had been framed precisely on the lines indicated in sub-cl. viii., with the result that Mrs. Adams is a person having the powers of a tenant for life under the settlement within the meaning of s. 20, sub-s. 1 (viii.), of the Settled Land Act, 1925, and the trustees ought to execute a vesting deed in her favour.

Solicitors: *Peacock, Fisher, Chavasse & O'Meara; Linklaters & Paines.*

H. C. H.

C. A. 1926 *Nov.* 9, 10.

HARMS (INCORPORATED), LIMITED, AND CHAPPELL AND COMPANY, LIMITED *v.* MARTANS CLUB, LIMITED.

[1926. H. 815.]

Copyright—Infringement—Musical Play—Performance at a Club—"In public"—Copyright Act, 1911 (1 *& 2 Geo.* 5, *c.* 45), *ss.* 1, 2.

The plaintiffs were the owners of the copyright in a musical play called "Tip Toes," published and brought out in America, but not yet produced in England. The defendants were a limited company and the proprietors of the Embassy Club in Old Bond Street, London, which had a membership of 1800 ladies and gentlemen of high social standing, and was a club for dining and dancing. On March 4, 1926, a musical number forming part of the play "Tip Toes" and entitled "That Certain Feeling," was performed by an orchestra at the Embassy Club before an audience of 150 members and 50 guests. Under the rules of the club there was no limit fixed to the number of guests that might be introduced by members:—

Held, that upon the facts there had been a representation "in public" of the musical composition in question, in derogation of the sole right of public performance given to the plaintiffs by the Copyright Act, 1911, and calculated to interfere with their proprietary rights.

Decision of Eve J. [1926] Ch. 870 affirmed.

APPEAL from a decision of Eve J. (1)

The first plaintiffs were the owners of the copyright in America of a musical play entitled "Tip Toes," and of a musical work forming part thereof, entitled "That Certain Feeling." Chappell & Co., Ld., were the musical publishers and equitable owners of the copyright in the said works.

(1) [1926] Ch. 870.

The defendants were the owners of a proprietary social and dancing club of high standing, known as the "Embassy Club," in Old Bond Street, London. On March 8, 1926, the plaintiffs alleged that the defendants, without the consent of the plaintiffs, had performed or authorized the performance of the musical work, "That Certain Feeling," by their orchestral band in public at the Embassy Club. The plaintiffs alleged that this constituted an infringement of their copyright, and claimed: (1.) An injunction to restrain the defendants from infringing the plaintiffs' copyright in the musical work, "That Certain Feeling," by performing the same in public without the consent of the plaintiffs, and from permitting the Embassy Club, or other place of entertainment, to be used for the performance in public of the said work without the plaintiffs' consent; and (2.) damages.

The defendants admitted the performance on March 4, 1926, but maintained that it was not "in public." It appeared that the total number of members of the Embassy Club was 1800, and on the night in question 150 members of the club had dined, and some 50 guests were also present at the subsequent performance and dancing. The rules of the club placed no express limit on the number of guests who might be introduced by members, but 10*s.* was to be paid for each visitor introduced after 9 P.M. The musical play, "Tip Toes," had been published simultaneously in the United States of America and a few copies in this country, but the play had not yet been produced in England. There was evidence by Mr. William Boosey, managing director of Chappell & Co., Ld., to the effect that the life of a popular song was short, and that the damage caused by the premature performance of musical pieces before production would cause great loss to the owners of the copyright.

The other facts and the description of the club sufficiently appear from the judgment of Eve J. (1), who held that the performance at the club was a performance "in public" within the meaning of the Copyright Act, 1911, and

(1) [1926] Ch. 870.

C. A. 1926 — HARMS (INCORPORATED) AND CHAPPELL & CO. v. MARTANS CLUB.

constituted an infringement of the copyright of the plaintiffs. A declaration to that effect was made and liberty given to the plaintiffs to apply for an injunction if necessity arose.

The defendants appealed. The appeal was heard on November 9 and 10, 1926.

Vaisey K.C. and *Winterbotham* for the appellants. It is admitted that the plaintiffs have sufficient interest to maintain this action; that the club was conducted in accordance with its rules at the relevant dates; and that the play had been published at the date in question. The appellants take objection to the decision of Eve J. on the grounds that the learned judge appears to have thought that whatever was not private or domestic must be public if done in the presence of a number of persons; that he considered the matter too much from the point of view of the composer; and that he relied strongly on the decision in *Duck* v. *Bates* (1), in which the question arose upon different words of another Act.

The words "in public" in s. 1, sub-s. 2, of the Copyright Act, 1911, must be construed strictly, and so construed do not apply to the performance in the present case. The defendant club is a social club and its premises are private. No member of the public is entitled to enter upon the club premises. The essential element of clubs is privacy; they are private associations, and the buildings they occupy are private premises. How can anything done in a club be said to be done in public?

The Act of 3 & 4 Will. 4, c. 15, prohibited a performance in a place of dramatic entertainment, but the present Act has confined the prohibition to a performance "in public," and the onus is on the plaintiffs to show that the representation was "in public," and we submit that what was done in this club, although not domestic or private, was not in public. Sect. 2, sub-s. 3, of the Copyright Act, 1911, shows that a man may make a profit in private without infringing the copyright, and s. 4 tends to show what a performance

(1) (1884) 12 Q. B. D. 79; 13 Q. B. D. 843.

in public means, for in that section "public" must mean the general public.

Duck v. *Bates* (1) was a decision upon 3 & 4 Will. 4, c. 15, which prohibited representation of a literary production at a place of dramatic entertainment, and by 5 & 6 Vict. c. 45 that prohibition was extended to musical composition. But in that case there was an element of publicity which was absent here, and the words which the Court had to construe, "any place or places of dramatic entertainment whatsoever," were very much wider than anything in the present Act. *Russell* v. *Smith* (2) and *Caird* v. *Sime* (3) are of no assistance in this case. The question whether a ball was public or private was considered in *Maloney* v. *Lingard* (4), and there are dicta in *Kelly* v. *London Pavilion, Ld.* (5), which are in the appellants' favour. In *Wall* v. *Taylor* (6), which was an action for the recovery of a penalty under the earlier Acts, the question what was a "place of dramatic entertainment" was discussed.

Gover K.C. and *Hon. S. O. Henn Collins* for the respondents were not called on.

LORD HANWORTH M.R. By s. 1, sub-s. 1, of the Copyright Act, 1911, it is enacted that, subject to the provisions of this Act, copyright shall subsist for the term provided in the Act in every original literary, dramatic, musical and artistic work, and by sub-s. 2, for the purposes of the Act "copyright" is defined to mean the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform the work or any substantial part thereof in public; and, by s. 2, sub-s. 1, "Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright."

(1) 12 Q. B. D. 79; 13 Q. B. D. 843.
(2) (1848) 12 Q. B. 217.
(3) (1887) 12 App. Cas. 326.
(4) (1898) 42 Sol. J. 193.
(5) (1897) 77 L. T. 215.
(6) (1883) 11 Q. B. D. 102.

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The owners of the copyright in a musical play which was published and brought out in America, but which at the material time had not yet been produced in England, have brought this action against the owner of the Embassy Club, in respect of a performance of a musical number forming part of this play, which took place on March 4 of this year at the Embassy Club. At that performance there were some 150 members of the club present and, in exercise of the privilege to which members were entitled under the rules of the club, there were in addition some 50 guests. Eve J. has held that the plaintiffs' right had been infringed and that what was done on March 4 at the Embassy Club was unauthorized and was an invasion of the plaintiffs' right, because there was a production of the work or a substantial part thereof in public.

The appeal is brought to this Court on the ground that Eve J. incorrectly interpreted the words "in public." He thought, in view of the fact that the performance was given at a club before a considerable number of its members and their guests, that there was no domesticity about it to prevent the performance being one which was in public. We have to consider whether Eve J. was right. In his judgment (1) he has fully stated the facts at greater length than I have recounted them, and he has tabulated the various matters to which he paid attention and on which he founded his decision that the plaintiffs' right had been infringed.

It is quite obvious that the use of the words "in public" gives rise to a number of difficulties. They are not easy words to define. They are commonly used in connection with a number of activities, which concern the community at large and which are of a far-reaching nature or effect. Our attention has been called to *Wall* v. *Taylor* (2) and to *Duck* v. *Bates* (3), upon which Eve J. relied. The actual terms of the Copyright Act, 1911, differ from those under which copyright in musical compositions had been secured to their authors previously. By 3 & 4 Will. 4, c. 15, s. 1,

(1) [1926] Ch. 870. (2) 11 Q. B. D. 102.
(3) 13 Q. B. D. 843.

the author of a dramatic composition was given the sole liberty of representing it at any place of dramatic entertainment, and by s. 2 penalties were imposed upon any one who offended against the right of the author. By 5 & 6 Vict. c. 45 the privileges given in copyright by 3 & 4 Will. 4, c. 15, were extended to musical compositions, and the sole liberty of representing any dramatic or musical composition was to be the property of the author. The effect of those two statutes and the sections to which I have referred was to give the author of a dramatic composition protection so as to enable him to prevent the representation of musical compositions in any place of dramatic entertainment to which his assent had not been secured. The words, therefore, of the Act which was in force previously to 1911, and which were repealed in the Second Schedule of the Act of 1911, are different from the words used in the later Act.

It is necessary at the outset to consider what is this right which is given to the author of a musical composition. Brett M.R. in *Duck* v. *Bates* (1) says: "I agree that what was intended to be protected was the value of the author's invention, that is the key to the construction of the Act: he does not want sentimental protection: he has power himself to represent his drama, and to confer upon others the right to represent it. That power gives a value to his production. If an author performs his drama, and if it is performed also by another, the author will be injured." We have, I think, therefore to consider that the Act of 1911 secures protection to the author; it gives him what is a valuable right. It is true that it gives it by entitling him to a monopoly, but that word must not be used in any sinister sense; it is a right given to him under the statute and in respect of which he is entitled to have protection. The cases to which I have referred discussed what was the meaning of the words, "place of dramatic entertainment," but I think it is noteworthy that the Court in both those cases said that the answer must largely depend upon the facts of the case.

(1) 13 Q. B. D. 843, 845.

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In *Planché* v. *Braham* (1), a much earlier case, the question arose what was a dramatic representation or dramatic production, because there the defendant had made use of a portion of the libretto for the music of Weber's opera of "Oberon," and Tindal C.J., in considering what was a dramatic production, said: "It is difficult to say what is or is not a representation of part of a dramatic production; the subject patitur majus et minus; and it must be left to a jury to determine the fact." In *Wall* v. *Taylor* (2) Brett M.R., in dealing with those words, "a place of dramatic entertainment," and what is a representation or performance, again said that it was a question of fact; and in *Duck* v. *Bates* (3) the Court of Appeal took the same line. Bowen L.J. says (4): "then the question of fact will arise, whether the place has not been so appropriated on any particular occasion," and later on: "There is a broad distinction between the present case and a performance to which the public at large or any portion of the public are invited; but the question must be to a certain extent a question of fact." It appears to me that these authorities are an abundant foundation for what Eve J. has determined—namely, that the question whether there was a performance in public is largely a question of fact and to be determined by the facts of each case.

It appears, therefore, that one starts with the question: What is it that has been secured to the author; what is it in respect of which he is entitled to protection? In considering here whether or not there has been within s. 2, sub-s. 1, an infringement of the author's sole right, one must see whether or not, upon the facts as a whole, the true view is that there has been a representation of this composition in public. In dealing with the tests which have been applied in the cases, it appears to me that one must apply one's mind to see whether there has been any injury to the author. Did what took place interfere with his proprietary rights? As to that, profit is a very important element. Next, you must consider whether there has been admission

(1) (1837) 4 Bing. N. C. 17, 19.
(2) 11 Q. B. D. 102, 107.
(3) 13 Q. B. D. 843.
(4) Ibid. 850.

of any portion of the public, with or without payment, and when you are considering what you mean by any portion of the public you will find in *Duck* v. *Bates* (1) that according to Brett M.R. it means the public who would go either with or without payment—the class of persons who would be likely to go to a performance if there was a performance at a public theatre for profit. Then one has also to consider whether or not the performance is a domestic one so as to exclude the notion of "public"—domestic in the sense that it was private and domestic, a matter of family and household concern only. Then again you must consider where the performance took place, bearing in mind that the place need not be one which is kept habitually for the exhibition of dramatic entertainments. I do not say that I have catalogued all the suggestions made as tests of the facts to be considered, but it appears to me that I have tabled enough to support the conclusion that Eve J. was right in his judgment.

I apply those tests to the present case. The club is a high class club, of which only persons can be members who are prepared to pay a substantial entrance fee and a substantial subscription. Great care is exercised in preventing any undesirable persons from becoming members, which is secured by annual re-election. One may take it, therefore, that the club has all the elements of a high class social club. What took place on March 4 was this. There was an entertainment of members, that number being limited, and there were in addition 50 persons who were guests and not members of the club. Who were those guests? Is it possible to deny that they were properly called members of the public? Some 200 persons were present at this performance—persons of a class who would be able to pay for entrance to any public theatre where the play might be performed, and they had the advantage of listening at a place with which they were familiar in the sense that it was on the club premises. I cannot answer the question: Was the author injured? in the negative. It seems that a number of persons had

(1) 13 Q. B. D. 843, 847.

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an opportunity there of enjoying the production who were of the class likely to go to a similar performance if an entrance fee was required. That brings me, therefore, to say that upon these facts Eve J. came to a right conclusion.

But I do not merely depend upon his decision having been reached upon materials which entitled him to come to that conclusion, for I desire to say that mine would have been the same. If one applies another fact—namely, that this is a proprietary club, which to some extent depends upon the activities of the committee and the members in providing entertainments—this appears to be an added factor not to be discarded, leading to the conclusion that it was in public. I do not, however, rely upon that factor. But it appears to me that upon the tests which I have applied the answer must be that there was here a performance in public. If it were possible to get round the Copyright Act by such a performance—if an author had no means of asserting his right in such a case—it appears to me that a very serious inroad would have been made upon his property. The Act itself, when it gives in s. 2, sub-s. 1, a test under which copyright is to be deemed to be infringed, is intending to indicate that the protection given to the author is large, and although it may be difficult to say whether or not an actual loss has been suffered, still certain facts are such as to enable you to deem that there has been an infringement.

For these reasons it seems to me that the appeal fails and the judgment of Eve J. must be affirmed.

SARGANT L.J. I am of the same opinion. It seems to me that it is as right to say with regard to this Act as it was to say with regard to the Act under which the case of *Duck* v. *Bates* (1) was decided, that the aim of the Act is the protection of authors of musical works or composers. If possible, I think, it is made clearer here by the direct language of this Act, because the Act proceeds by way of making an express grant to the composer of the sole right to produce and

(1) 13 Q. B. D. 843.

reproduce the work or any substantial part thereof in public, and under the ordinary principles of a grant, which apply, I think, quite as much to a statutory grant as to a private grant, the grant is to be construed in favour of the grantee, and accordingly the composer becomes entitled to a right which is not to be lightly defeated or affected by the acts of others in derogation of that grant. The word "monopoly" has been used, but I think all suggestions that lie in the word "monopoly," adverse to the principle of monopoly, are singularly wanting in the case of the protection of the property of authors and composers. I suppose there is no property which juristically speaking is more entirely the property of an individual than work which has been the direct result of the labour and the talent or genius of the author or composer who has given it to the world; and the copyright which is given to him is not in derogation of the right of any other person to perform something similar which has come from the brains and intelligence of that person, but it is merely the right to prevent other people from copying and appropriating that which is the true property and the true invention of the original author or composer.

With these remarks, I pass on to consider whether here there has been a performance in public such as to derogate from the right of the composer, and, probably or possibly, to inflict on him loss in consequence. Reference has been made to *Duck* v. *Bates* (1), and although the circumstances were different there in many respects, no doubt the lines on which the reasoning of the Court went are very appropriate to be considered in the present case. But to my mind the case here is infinitely stronger in favour of the plaintiff than in *Duck* v. *Bates* (1), which, it must be remembered, was very much upon the borderline, and in which the defendant only just managed to escape. In *Duck* v. *Bates* (1) there was a very strong flavour of privacy and domesticity present. The performance was not for profit, which is very important. It was given to the nurses and staff of Guy's Hospital; the persons who were admitted

(1) 13 Q. B. D. 843.

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were persons connected with the management and carrying on of that hospital, together with a certain number of persons who were friends of the amateurs. In that state of things it seems to me that the whole performance was of the nature of an enlarged family or domestic performance, and was therefore such as might well be held not to be within the restrictions of the statute then in existence, or to be likely to derogate from the exclusive rights which had been given to the author. But, as I say, the case was so very near the line that there was a dissentient judgment of Fry L.J., and a very little might have turned the scale.

Here it seems to me that the matter is entirely different, and that the difference is all against the present appellants. We have a proprietary club run by the present appellants. I have not a word to say against the club itself. It appears to be a club the rules of which provide for admission of persons of a certain social standing, and the subscription to it ensures that they are persons with a certain amount of ready money: but the membership of the club and the question of the persons who are to benefit from the running of the club are totally and entirely distinct. Each member no doubt when elected has to take a preference share in Martans Club, Ld., but it is quite obvious that the ordinary shares of that company, or the shares of some nominees, which do not come to members of the Embassy Club on their election as members of the Embassy Club, are held by persons who run the club as a club, giving entertainments on the premises of the club and deriving a profit from the entertainments so given. Apparently there is a paid orchestra provided by the proprietors of the club, and dancing takes place, I do not know how often, but frequently. The members of the club purchased the advantages of the club, including the advantage of listening to the orchestra and dancing to its strains, not by making a payment on each occasion of entering the club, but by paying an entrance subscription and an annual subscription, and as between themselves, the members of the club and Martans Club

which runs the Embassy Club, it appears to me that they are in very much the same position in which persons who subscribe to a season of Grand Opera, and get their boxes or their stalls for the season, are with relation to the entrepreneur who runs the opera.

With regard to the Embassy Club, there has to be an election of the members of the club, but in my opinion Martans Club, Ld., the proprietors of the Embassy Club, are and have been inviting a portion of the public to come in and be elected members of the club in exchange for the subscriptions which they will thereupon pay to the proprietors of the club to provide them with an orchestra to which they can dance, as well as other advantages. Therefore I think that in this case, when the orchestra is playing the music, which is the copyright of the plaintiff, you do have a real performance of the very tune in question for profit to a portion of the public who have paid for the privilege by an annual subscription and an entrance fee. To my mind, that is clearly in derogation of the sole right of public performance given to the author, and in my judgment likely to operate in very serious derogation of the pecuniary profit that may be derived from it. That appears from the evidence which was given in the case, but of course that evidence alone would not be sufficient; because although the author might be injured if that which the defendants were doing was in derogation of the monopoly given to the author, the mere pecuniary damage could not in itself be sufficient to constitute a cause of action.

I associate myself with the views expressed by the learned judge below and by the Master of the Rolls, but I wish in addition to lay very great stress upon this clear feature in the present case, as it appears to me—namely, that there has been an invitation to the members of the public capable of becoming members of the club upon the terms of getting in return for their subscription the performance of music, so that you do really get an invitation to the public, and an invitation to the public to listen at a price or at a payment, though the payment is an annual one. Beyond that, there

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is of course this, that the members of the public who have become members of the club by passing through the not very severe test which is imposed, have also the privilege of bringing in other members of the public upon whom no test is imposed, who happen to be their friends and are invited on any particular evening. I am not sure whether this was shown in the Court below, that though there was a single performance on the night in question, I suppose the right which is claimed would be really to play this tune, amongst other tunes, on any night on which there was dancing at the Embassy Club, and so long as the comparative freshness of the tune would be an inducement to persons to come and dance at the club. If that were so, it seems to me that there again you find a very serious derogation of the plaintiff's right, because the tune is liable to be played until its freshness has worn off, and therefore a very large part of the value of the composition to the plaintiff has disappeared.

For these reasons I agree that the appeal should be dismissed.

LAWRENCE L.J. I agree. It is not disputed by the appellants that the question whether any particular performance is a performance in public within ss. 1 and 2 of the Copyright Act, 1911, is a question of fact. Eve J. properly treated this case as one of fact, and held that the performance complained of was a performance in public. In arriving at that decision the learned judge has, in my opinion, taken into consideration all the relevant factors, and I entirely agree with the conclusion which he has reached.

Appeal dismissed.

Solicitors for the appellants: *Whitelock & Storr.*
Solicitors for the respondents: *Pollock & Co.*

R. M.

FORSTER *v.* NATIONAL AMALGAMATED UNION OF SHOP ASSISTANTS, WAREHOUSEMEN, AND CLERKS.

EVE J.
1927
Jan. 19, 20, 21.

[1925. F. 1769.]

Trade Union—Affiliation Fees—Application for political Purposes—Statutory Restrictions—Rules—Trade Union Act, 1913 (2 & 3 *Geo.* 5, *c.* 30), *ss.* 1, 3.

By s. 3, sub-s. 1, of the Trade Union Act, 1913, it was provided that the funds of a trade union should not be applied either directly, or in conjunction with any other trade union, or body, or otherwise, indirectly in the furtherance of the political objects specified in sub-s. 3 of s. 3, unless those objects had been approved as an object of the union by a resolution duly passed on a ballot of the members taken for the purpose; and unless rules to be approved by the Registrar of Friendly Societies were in force providing that payments for those objects were to be made out of the political fund of the union. A valid resolution of the members for the specified purpose was passed, and rules approved by the Registrar of Friendly Societies were in force providing as required by that sub-section. It was also provided by sub-s. 2 of s. 3 that any member of a trade union aggrieved by any breach of the rules might complain to the Registrar of Friendly Societies to remedy the breach, and his decision would be binding and conclusive upon all parties without appeal. In 1925 the plaintiff applied to the Registrar of Friendly Societies alleging that some of the general funds of the defendant union, of which he was a member, had been applied through the Trades Union Congress in furtherance of various political objects in breach of the rules of the union. The Registrar decided that there had been no breach and declined to make any order. In an action by the plaintiff for relief based on an alleged breach by the defendant union of s. 3 of the Trade Union Act, 1913, in respect of the same matters :—

Held, that the conditions precedent stated in s. 3, sub-s. 1, of the Act having been duly complied with, the statutory restrictions thereby imposed had ceased to operate, so that no breach of the statute had been established, and the action failed. The plaintiff's true cause of action in the circumstances was in respect of a breach of the rules of the defendant union which was not directly raised upon the record; even assuming that it had been, the legislature did not contemplate that an aggrieved person who had complained to the Registrar upon the footing of a breach of the rules and failed, could afterwards resort to the Court.

WITNESS ACTION.

The plaintiff, John Ferdinand Forster, was and had been since February 6, 1905, a member of the defendant union, a trade union duly registered under the Trade Union Acts,

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1871–1917. It was provided by the rules of the defendant union (inter alia) that its objects were: (*a*) the raising and maintaining of funds for the benefit of members to be applied for various purposes with the view of promoting such benefits, and (*b*) subject to the Trade Union Act, 1913, to apply the funds of the union, either directly or in conjunction with any other trade union, association, or body, or otherwise, indirectly in the furtherance of all or any of the political objects mentioned in s. 3, sub-s. 3 (*a*) (*b*) (*c*) (*d*) (*e*), of the Trade Union Act, 1913.

The defendant union under the provisions of the said Act had provided a separate fund as the political fund of the union. The plaintiff duly gave notice under the rules of the defendant union that he objected to contribute to the political fund, and was in consequence exempt under the said Act from contributing to that fund. By the rules in respect of the political fund, under the Trade Union Act, 1913 (forming part of the rules of the defendant union), issued on July 1, 1925, registered under the Trade Union Act and approved, it was provided by r. 45, sub-r. 2, that "any payments in the furtherance of such political objects shall be made out of a separate fund (thereinafter called the political fund) of the union." By para. 5 of the plaintiff's statement of claim it was pleaded that by s. 3, sub-s. 1, of the Act the funds of the defendant union other than the political fund could not lawfully be applied directly, or in conjunction with any other trade union, association or body, or otherwise, indirectly in the furtherance of the said defined political objects. By para. 6 it was alleged that the defendant union, contrary to the provisions of s. 3 of the Act, had in conjunction with other trade unions, associations, or bodies, and indirectly applied a part of its funds in the furtherance of the said defined political objects, and such payments had been made otherwise than out of the political fund. It was alleged that the defendant union had in the years 1924 and 1925 paid otherwise than out of its political fund the sum of 469*l.* 5*s.* under the name of an affiliation fee to a body called the Trades Union Congress. This was a body of persons

constituted by some 200 trade unions having a total membership of over 4,000,000 persons. The business of the Trades Union Congress was carried on by a general council and included the furtherance of the defined political objects. The expenses incurred by the Congress were defrayed mainly out of the affiliation fees paid by the various trade unions (including the defendant union) out of the general funds of these unions. Various payments of a political character were alleged to have been made by the Trades Union Congress, and (inter alia) large grants to the Daily Herald, a paper which was conducted for the furtherance of the cause of labour and Socialistic and political views, and sums of money had been contributed for the production and distribution of political literature, and in support of a Labour Party's candidate. The plaintiff therefore claimed an injunction to restrain the defendant union, its servants or agents, from applying directly or in conjunction with any other trade union, association, or body, or otherwise indirectly, any of the general funds of the union in the furtherance of the political objects to which s. 3 of the Trade Union Act, 1913, applied, and in particular from paying any contribution or sum to a body of persons known as Trades Union Congress so long as that body expended its funds or part thereof in furtherance of such political objects, or intended so to do. Pursuant to an undertaking given on June 11, 1926, on the hearing of a summons, further and better particulars of the statement of claim were delivered by the plaintiff. These included a list of the amounts alleged to have been paid otherwise than out of the political fund and from the affiliation fees to the Trades Union Congress from the years 1919 to 1925, and some fifty-two items of sums varying from a few pounds to 40,000*l.* were expended by specified bodies on specified dates for the furtherance of definite political objects. The largest item was stated to be for the Daily Herald development fund in 1923, and other considerable sums were provided for the International Trade Union Bureau, and for labour publications. By their defence the defendant union gave a general denial to the statements made in the

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statement of claim, with certain admissions, and by para. 2 it was stated that the furtherance of the political objects in para. 5 of the statement of claim, and now referred to as "the said defined political objects," had been approved as an object of the defendant union by a resolution now in force passed on a ballot of the members of such union taken in accordance with the Act by a majority of the members voting, and that rules of the defendant union approved by the Registrar of Friendly Societies were in force containing provisions in accordance with paras. (*a*) and (*b*) of sub-s. 1 of s. 3 of the said Act. The defendant union denied that any payments had been made in the furtherance of any of the said defined political objects otherwise than out of its political fund, either in conjunction with other trade unions, associations, or bodies indirectly or otherwise, and denied that it had made such payments contrary to the provisions of s. 3 of the Act. The defendant union claimed the right to pay its affiliation fee to the Trades Union Congress out of its general funds, and denied that such moneys, if so paid, would be applied for the said defined political objects contrary to the Trade Union Act, 1913. The defendant union also relied on the fact that in March, 1925, the plaintiff complained to the Registrar of Friendly Societies, pursuant to s. 3, sub-s. 2, of the Trade Union Act, 1913, in respect of the same matters as were complained of in the present action in breach of the rules of the union, and the Registrar, after hearing the complainant by his counsel, determined that the defendant union had not committed any breach of the rules referred to in para. 2 of the defence, and therefore made no order on the plaintiff's application.

Montgomery K.C., *Manning K.C.* and *Swords* for the plaintiff. The general funds of the defendant union have been applied indirectly to political objects by means of the affiliation fees paid to the Trades Union Congress. By this Act, which is a prohibition Act more than an enabling Act, the moneys for these political objects were payable only out of the political fund of the defendant union, and in accordance

with the rules of the union. No question would have arisen had these fees been paid out of the political fund, but that has not been done. A clear distinction was drawn by the Act between political objects and the statutory objects which were stated in s. 1, sub-ss. 1 and 2, of the Act. The restrictive provisions on the application of funds for certain political purposes are laid down in s. 3, sub-s. 1, of the Act. (1)

(1) By the Trade Union Act, 1913, it is enacted:—

Sect. 3, sub-s. 1: "The funds of a trade union shall not be applied, either directly or in conjunction with any other trade union, association, or body, or otherwise indirectly, in the furtherance of the political objects to which this section applies (without prejudice to the furtherance of any other political objects), unless the furtherance of those objects has been approved as an object of the union by a resolution for the time being in force passed on a ballot of the members of the union taken in accordance with this Act for the purpose by a majority of the members voting; and where such a resolution is in force, unless rules, to be approved, whether the union is registered or not, by the Registrar of Friendly Societies, are in force providing:—

(*a*) That any payments in the furtherance of those objects are to be made out of a separate fund (in this Act referred to as the political fund of the union), and for the exemption in accordance with this Act of any member of the union from any obligation to contribute to such a fund if he gives notice in accordance with this Act that he objects to contribute; and

(*b*) That a member who is exempt from the obligation to contribute to the political fund of the union shall not be excluded from any benefits of the union, or placed in any respect either directly or indirectly under any disability or at any disadvantage as compared with other members of the union (except in relation to the control or management of the political fund) by reason of his being so exempt, and that contribution to the political fund of the union shall not be made a condition for admission to the union."

Sub-s. 2: "If any member of a trade union alleges that he is aggrieved by a breach of any rule made in pursuance of this section, he may complain to the Registrar of Friendly Societies, and the Registrar of Friendly Societies, after giving the complainant and any representative of the union an opportunity of being heard, may, if he considers that such a breach has been committed, make such order for remedying the breach as he thinks just under the circumstances; and any such order of the Registrar shall be binding and conclusive on all parties without appeal and shall not be removable into any court of law or restrainable by injunction, and on being recorded in the county court, may be enforced as if it had been an order of the county court."

Sub-s. 3: "The political objects to which this section applies are the expenditure of money—

(*a*) On the payment of any expenses incurred either directly or indirectly by a

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As to the two conditions imposed by s. 3, sub-s. 1, it must have been the intention of the legislature to imply the further condition, that no moneys of the trade union other than those of the political fund should be applied in the furtherance of the specified political objects. In the present case there was both a breach of the rules made in pursuance of the section and also a violation of the prohibition in sub-s. 1. The matters dealt with by the Trades Union Congress were largely political and came out of the general funds of the various unions. They were expended (inter alia) upon the preparation and printing of political documents within s. 3, sub-s. 3, of the Act. Money was paid for the support of the Daily Herald, considered to be the mouthpiece of the Labour Party, and upon various pamphlets and leaflets of a political character.

Wilfrid Greene K.C. intimated that he was going to submit that the present action as a whole was misconceived, being framed upon a breach of the Act and not a breach of the rules.

[EVE J. If what is complained of is only a breach of the rules and not of the statute, it may be that I have no jurisdiction to decide it.]

The case before the Court is much wider than that before the Registrar and covers fresh ground. The jurisdiction of this Court is not taken away where an infringement of the statutory restrictions is involved.

[At the conclusion of the plaintiff's case his counsel applied for leave to amend the statement of claim by inserting in

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candidate or prospective candidate for election to Parliament or to any public office, before, during, or after the election in connexion with his candidature or election; or

(*b*) On the holding of any meeting or the distribution of any literature or documents in support of any such candidate or prospective candidate; or

(*c*) On the maintenance of any person who is a member of Parliament or who holds a public office; . . . . or

(*e*) On the holding of political meetings of any kind, or on the distribution of political literature or political documents of any kind, unless the main purpose of the meetings or of the distribution of the literature or documents is the furtherance of statutory objects within the meaning of this Act."

clause 6 thereof after the word "indirectly" the words "and contrary to the rules of the union made in pursuance of s. 3, sub-s. 1 (*a*)."

EVE J., after considering the pleadings in the action, the nature of the proposed amendment, the time when the application was made, and the extent to which the amendment might prejudice the position of the defendant union, declined to allow it.]

Wilfrid Greene K.C., *Sir Henry Slesser K.C.*, *J. H. Stamp* and *Arthur Henderson* for the defendant union were not called upon, and his Lordship then gave judgment upon the case as raised by the pleadings.

EVE J. The plaintiff's claim to relief in this action is based on the alleged breach by the defendant union of s. 3 of the Trade Union Act, 1913. That this is so appears from the allegations in paras. 4, 5 and 6 of the statement of claim. The first question I have to decide is whether he has established any such breach. By sub-s. 1 of the section in question restrictions are imposed on the application of the funds of a trade union for the political objects specified in sub-s. 3, unless the furtherance of those objects has been approved as an object of the union by a resolution of the nature therein mentioned, and rules approved by the Registrar of Friendly Societies are in force providing that any payments in furtherance of those objects are to be made out of a particular fund, referred to in the Act as the political fund of the union. It is also provided that any member may, by appropriate notice, claim and obtain exemption from any obligation to contribute to the political fund; and, putting it shortly, that no prejudice, disability, or disadvantage is to attach to the non-contributing member, or any person intending to become a member, by reason of his claiming that exemption.

It is admitted that a valid resolution has been passed, and that rules approved by the Registrar of Friendly Societies providing for all and each of the matters referred to in paras. (*a*) and (*b*) of sub-s. 1 were, at the date of the writ,

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and still are, in force. In these circumstances all the conditions precedent have been complied with, and, in my opinion, the statutory restrictions have ceased to operate. I cannot accept the view that by the wording of this section any implication is raised that, after fulfilling all the conditions mentioned in the section, the restrictions still survive as statutory restrictions. On the contrary, from that time forward any alleged breach was a question to be determined by the rules and not by the statute. The procedure adopted by the union has been in accord with, and not in breach of, the Act, and no such cause of action as the plaintiff has advanced was subsisting when the writ was issued.

If the facts on which the plaintiff relies constitute a misapplication of the general funds of the union, his cause of action is a breach of the rules, in particular of r. 45, sub-r. 2, and this appears to have been his own opinion when he first desired to raise the question and availed himself of his statutory right under s. 3, sub-s. 2, of the Act, by laying a complaint before the Registrar. In considering these matters one must not omit to notice what was the effect of that procedure on the plaintiff's part. Had the complaint resulted in the making of an order for remedying the breach, the union would have had no alternative but to give effect to that order. It is clear that there could have been no appeal, and that by no procedure in this Court could the union have evaded the statutory duty imposed upon it of obeying the order. Now the question, which is not raised as the record stands in this action, except in so far as the plea of res judicata has been put forward in the defence, is whether the plaintiff in these circumstances, even assuming that he had brought his action on the footing of a breach of the rules and not merely of the Act, could have maintained the action. The legislature has provided a remedy of which an aggrieved member may avail himself, and which, if he does avail himself of it, puts the union at the risk of being compelled to remedy the matters complained of. Did the legislature contemplate that the aggrieved member, who has carried in his complaint, and failed to satisfy the

Registrar that there was any proper foundation for it, should be allowed to commence an action and seek relief in connection with the same matters, thereby exposing the union to further litigation? I very much doubt whether that is the position of the aggrieved member.

According to the construction which I put on s. 3, sub-s. 2, the legislature contemplated that the matter of the application of the funds should be dealt with as it has now been dealt with and should be determined by the tribunal indicated in that sub-section, and did not contemplate that it should be open to the member after he had submitted the matter to the Registrar, and had failed to get relief, to resort to the Court. The question whether the sub-section leaves it open to him to elect whether he will go to the Registrar, or to the Court, has not been argued; but, assuming that there is such an election, this plaintiff adopted an attitude which disclosed his election, and it is not open to him now, having failed before the Registrar, to proceed by action in this Court. But this does not really arise on the pleadings here, and it is perhaps enough to say that the relief sought in this action is not founded on any breach by the union of the rules, but on an alleged breach of the statute; and no such breach having been established, I have no alternative but to dismiss this action, and to dismiss it with costs.

Solicitors: *Rhys Roberts & Co., for Horace A. Davies, Cardiff; Shaen, Roscoe, Massey & Co.*

G. M.

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[1926. W. 936.]

Safeguarding of Industries—Dye-making—Prohibited Imports—"Synthetic organic dyestuffs, colours, and colouring matters"—Manufactured articles—Artists' Colours and Materials—Copying Ink Pencils—Minute non-separable Ingredient of prohibited Matter—Dyestuffs (Import Regulation) Act, 1920 (10 & 11 *Geo.* 5, *c.* 77), *s.* 1, *sub-s.* 1.

Sect. 1, sub-s. 1, of the Dyestuffs (Import Regulation) Act, 1920, prohibits certain imports "with a view to the safeguarding of the dye-making industry."

These forbidden imports are (*a*) "all synthetic organic dyestuffs, colours and colouring matters," and (*b*) "all organic intermediate products used in the manufacture of" the same :—

Held, that manufactured articles containing a minute and (commercially) non-separable ingredient of the prohibited matter fell within the prohibition, though the articles themselves (artists' colours and materials and copying ink pencils) would be of no direct use in the dye-making industry.

WITNESS ACTION.

This was an action to test the validity of certain Board of Trade notices issued under the provisions of the Dyestuffs (Import Regulation) Act, 1920, which was passed on December 23, 1920, and came into operation on January 15, 1921.

By s. 1, sub-s. 1, "with a view to the safeguarding of the dye-making industry," the importation into the United Kingdom of the following goods, that is to say, "all synthetic organic dyestuffs, colours and colouring matters, and all organic intermediate products used in the manufacture of any such dyestuffs, colours or colouring matters," shall be prohibited.

By sub-s. 2 goods prohibited to be imported by virtue of this Act shall be deemed to be included among the goods enumerated and described in the Table of Prohibitions and Restrictions Inwards contained in s. 42 of the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), and the provisions of that Act and of any Act amending or extending that Act shall apply accordingly.

Sect. 2, sub-s. 1, empowers the Board of Trade "by licence to authorize," either generally or in any particular case, "the importation of any of the goods," or any class or description of the goods, "prohibited to be imported by virtue of this Act."

Sub-s. 2 provides that the licence shall not be transferable.

By sub-s. 3. For the purpose of advising them with respect to the granting of licences, the Board shall constitute a committee consisting of five persons "concerned in the trades in which goods of the class prohibited to be imported by this Act are used," three persons "concerned in the manufacture of such goods" and three other persons "not directly concerned as aforesaid." Such one of the three last mentioned persons as the Board shall appoint shall be chairman of the committee.

Sub-s. 5 entitles an applicant for a licence to object to any member of the committee, who is a trade competitor, dealing with his application.

By sub-s. 6. For the purpose of advising them with respect to the efficient and economical development of the dye-making industry, the Board shall constitute a committee of persons "concerned in the trades of dye-maker or dye-user" and of such other persons "not directly concerned in such trades" as the Board may determine.

Sub-s. 7 enables the Board to charge in respect of a licence a fee not exceeding five pounds.

On October 21, 1925, the Board of Trade published a notice to importers under the provisions of the above Act. The notice, headed "Dyestuffs (Import Regulation) Act, Licences for Artists' Colours and Materials," stated "The Board of Trade desire to draw the attention of importers to the fact that the open general licence which was in force under the above Act in respect of the importation of artists' colours and materials of synthetic organic origin when fully made up and ready for use as such (including paint boxes) has now been revoked and consequently individual licences will in future be required in connection with each consignment of these materials which it is desired to import.

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Application for licences, which must in all cases be obtained before the shipment of the goods to this country, should be made on the prescribed form to the Dyestuffs Advisory Licensing Committee 53 Spring Gardens Manchester.

Similar individual licences will in future be required in respect of the importation of copying ink pencils and other coloured pencils in which the colouring matter concerned is of synthetic organic origin": see Board of Trade Journal, October 1, 1925, p. 361.

On January 21, 1926, the Board of Trade published an amending notice with the same heading stating: "The Board of Trade announce that as a result of consideration which has been given to certain representations which have been made to them in connection with the importation of copying ink pencils and other coloured pencils of synthetic organic origin, a notice regarding which appeared in the Journal of October 1 last, it has been decided that, for the present, licences will not be required under the Dyestuffs (Import Regulation) Act, 1920, in respect of these materials.

Similarly an open general licence has been issued under the above Act covering the importation of all paint boxes containing paints of synthetic organic origin provided that the value of each box proposed to be imported does not exceed sixpence. Consequently individual licences for specific consignments will not in future be required for paint boxes (complete and ready for use) not exceeding a maximum value of six shillings a dozen. Licences will however continue to be necessary for all consignments of these paint boxes which exceed the maximum value referred to above and application for such licences should be made on the prescribed form to the Dyestuffs Advisory Licensing Committee 53 Spring Gardens Manchester before the goods are shipped to this country": see Board of Trade Journal, January 21, 1926, p. 67.

On March 23, 1926, the plaintiffs, who, as London importers and exporters of fancy goods and toys, including (*a*) paint boxes (more or less toys) containing artists' colours and materials, and (*b*) copying ink pencils and other coloured

pencils, were liable to expense and inconvenience by the requirement of these licences, and might be subjected to penalties for non-compliance therewith, commenced this action for a declaration—(1.) That the notices were unauthorized and invalid; (2.) That the goods specified in the notices—namely: (*a*) Artists' colours and materials, and (*b*) Copying ink pencils and other coloured pencils, were not goods prohibited to be imported by virtue of s. 1, sub-s. 1, of the above Act; (3.) That the plaintiffs were under no obligation to comply with the requirements of the notices.

The plaintiffs called expert evidence to the effect that "synthetic organic" meant a compound of carbon made by a process, such as manufactured indigo, and not a mere extract, such as natural indigo extracted from a plant. Very few artists' colours contained synthetic organic material, as those colours were required to be permanent. They were applied to the surface, whereas dyes permeated the mass in chemical combination. If the artists' colours did contain any such material, it would be commercially impossible to separate it, though the colour in fact was only a mixture and not a chemical compound. In a specimen box of twenty-two child's paints priced at 2*s.* or 2*s.* 6*d.* the percentage of synthetic organic matter was about $\frac{1}{4}$ per cent. by weight. Only seven out of the twenty-two had any trace of it, the highest being one paint which had nearly 1 per cent. Dyed cloth, on the other hand, contained nearly 5 per cent. and dyed leather 3 per cent. of synthetic organic material, but that again could not be separated as a commercial proposition. The copying ink pencils and other coloured pencils no doubt contained a much higher percentage of synthetic organic material, but its extraction for separate use would be commercially impossible.

The defendant's expert evidence on material points was to much the same effect.

Comyns Carr K.C., *W. M. R. Pringle* and *J. Chapman Parry* for the plaintiffs. Owing to the cessation of German dye

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imports during the war the British dyes industry was started, and at the close of the war it became necessary to safeguard that industry from German competition. Having regard to the decision of Sankey J. in *Attorney-General* v. *Brown* (1) this could not be done under the Customs Consolidation Act, 1876, s. 43, and it was necessary to resort to special legislation for the purpose. In these circumstances the Dyestuffs (Import Regulation) Act, 1920, was passed.

This is a penal statute, and its provisions must be carefully scrutinized.

In the first place, "With a view to the safeguarding of the dye-making industry," certain imports are forbidden by s. 1, sub-s. 1. What are those forbidden imports?

They are: (*a*) "all synthetic organic dyestuffs, colours and colouring matters"

and (*b*) "all organic intermediate products used in the manufacture of" the same.

The words "synthetic organic" admittedly govern "colours" and "colouring matters" as well as "dyestuffs." In other words colours and colouring matters in themselves "synthetic organic" are prohibited. But where in the sub-section is there anything to cover a manufactured article of which the synthetic organic matter is merely an ingredient, and particularly a minute non-separable ingredient, as in the present case? Surely such an article cannot be within the scope of the section.

This view is strongly enforced by s. 2, sub-s. 3. In what trade are children's paints and paint-boxes used, and who are concerned in their manufacture? Surely not members of the dye-making industry! Artists' colours cannot conveniently be used as dyes, or dyestuffs for painting. If the wide interpretation of the Board of Trade is correct the forbidden imports would include books bound in leather, motor cars upholstered with leather, dyed silk, wool and cotton goods, coloured picture postcards printed with coal tar dye inks, coloured jellies, and hundreds of other manufactured articles containing traces of synthetic organic

(1) [1920] 1 K. B. 773.

dyestuffs, colours or colouring matter, which traces have lost their identity in the manufactured article.

The Court has power to make a declaratory order against the Attorney-General: *Dyson* v. *Attorney-General.* (1)

Sir Douglas Hogg A.-G. and *Dighton Pollock* for the Attorney-General. The jurisdiction to make such declarations should be sparingly exercised: *Markwald* v. *Attorney-General.* (2) The requirement of a licence for copying ink pencils and other coloured pencils was withdrawn before action, and in any event no declaration should be made in that respect.

As to the main point, the action is misconceived. Sect. 1, sub-s. 1, contains an absolute prohibition against the importation of "synthetic organic" dyestuffs, colours and colouring matters in any shape or form whatever. Sect. 2 enables the Board of Trade to license the importation of certain goods, though prohibited.

The fallacy underlying the plaintiffs' argument is that they limit the statutory safeguarding of the dye-making industry to substances directly used in that industry, e.g., for dyeing textiles and so on. But why should the industry not be protected in its home output, including the supply of synthetic organic dyestuffs, colours and colouring matters to the manufacturers of artists' colours and materials or the manufacturers of copying ink and other coloured pencils? There is nothing in the Act to limit the protection in the way the plaintiffs suggest.

Comyns Carr K.C. in reply. The requirement of a licence for copying ink pencils and other coloured pencils is only withdrawn "for the present." It can be reimposed at any moment. This state of uncertainty is most damaging to our business, and we ask for a declaration as to those articles.

As to the main point. The Legislature could no doubt have protected the home output of the dye-making industry, and prohibited the import of any manufactured article containing any synthetic organic dyestuff, colour, or colouring

(1) [1912] 1 Ch. 158. (2) [1920] 1 Ch. 348, 357.

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matter as an ingredient. But this is exactly what it has not done. These manufactured articles are not prohibited, and no licence is necessary. The Board of Trade notices to the contrary are therefore wholly ultra vires, and we are entitled to the declarations we ask.

ASTBURY J. [after stating the facts and reading the declarations asked:] As far as copying ink pencils and other coloured pencils are concerned the Board of Trade issued a notice some time before action that no licence would be required, and I certainly do not propose, in my discretion, to make any declaratory judgment with regard to a matter in which, at the date of the issue of the writ, the plaintiffs were in no way directly interested.

As to the rest of the case, the paint boxes of artists' colours and materials imported and sold by the plaintiffs are admitted to contain a certain proportion of colours containing a very small proportion of synthetic organic dyestuff.

The plaintiffs contend that the colours so dealt in by them are not within the prohibition of s. 1, sub-s. 1. They submit that the object of the 1920 Act is plain from its language—namely, the view of safeguarding the dye-making industry They put their case on the footing, or, at all events, having regard to the fact, that these colours and colouring matters imported by them contain so small a proportion of synthetic organic dyestuff that it could not be recovered by any commercial process. On this footing they contend that the colours containing this small proportion do not fall within the meaning or language of the Act.

In my opinion that contention is unsound. Whether the Board of Trade have acted wisely or unwisely is not my concern. All that I can deal with is the construction of the Act. It is perfectly plain that it contains a general prohibition against importing synthetic organic dyestuffs or colours and colouring matter consisting of or containing synthetic organic matter.

It may be that for the purpose of safeguarding the dye-making industry the Board of Trade, advised as they are

by the committee of eleven under s. 2, sub-s. 3, take the view that it is necessary to protect the various trade outlets and trade use of dyes when manufactured. They have already withdrawn the prohibition as to copying ink pencils and other coloured pencils, and I am not going to discuss whether there ought to be a declaration as to those, that being a merely academic question.

As to paint boxes containing artists' colours and materials, those imported by the plaintiffs consist of or contain, in small part it is true, synthetic organic colours and colouring matters. These artists' colours and materials are themselves imported as colours intended to be used and sold as colours and colouring matter. That being so, it is impossible for me to declare generally that artists' colours and materials containing synthetic organic elements do not fall within the Act.

Expert evidence, though hardly necessary, was called, and the experts on both sides are in substantial agreement as to all relevant matters. The actual value of the paint boxes is irrelevant, so long as it exceeds sixpence each.

I am, however, asked to make a general declaration that artists' colours and materials containing these synthetic organic products, and copying ink pencils and other coloured pencils containing similarly synthetic organic material, are not prohibited by the Act.

In my opinion the Act plainly prohibits any importation of articles consisting of or containing synthetic organic dyestuffs, synthetic organic colours, or synthetic organic colouring matters in any shape or form whatever, unless that importation is licensed by the Board of Trade. That being so, this action is misconceived and must be dismissed.

[The question whether the defendant, as representing the Crown, was entitled to receive costs was then discussed, but as the parties were not fully prepared to argue this point the following order was made: "Action dismissed. Plaintiffs to pay defendant's costs unless before the end of January, 1927, the parties agree to the contrary, or make an application

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to decide the question. Order to be post-dated to date on which question of costs is agreed or decided." In the event, however, no subsequent application was made, and the point was never decided.]

Solicitors: *Stikeman & Co.; The Solicitor, Board of Trade.*

G. R. A.

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In re HARROW SCHOOL GOVERNORS AND MURRAY'S CONTRACT.

[1926. H. 3985.]

Education—Public School—Assurance of Land for educational Purposes—Double Attestation and Enrolment unnecessary—Sanatorium—Education Act, 1918 (8 & 9 *Geo.* 5, *c.* 39), *s.* 46—*Education Act*, 1921 (11 & 12 *Geo.* 5, *c.* 51), *s.* 117.

The Education Act, 1918, s. 46, reproduced by the Education Act, 1921, s. 117, applies generally to all schools, including public schools.

Consequently, an assurance of land to a public school for educational purposes is exempt from the attestation and enrolment requirements of the Mortmain and Charitable Uses Act, 1888, s. 4, sub-ss. 6, 9.

In the case of a public school the provision of a sanatorium is an educational purpose.

VENDOR AND PURCHASER SUMMONS.

Under and by virtue of a charter of Queen Elizabeth dated February 6, 1572; the Public Schools Act, 1868 (31 & 32 Vict. c. 118), ss. 3, 7; the Public Schools Act, 1869 (32 & 33 Vict. c. 58), s. 2; the Public Schools (Shrewsbury and Harrow Schools Property) Act, 1873 (36 & 37 Vict. c. 41), ss. 4, 5; and a Scheme of May 12, 1874, sanctioned thereunder, the Harrow School Governors were a body corporate with a common seal and a licence to acquire and hold lands in mortmain for the educational purposes for which the school was established.

By a conveyance on sale dated October 14, 1920, Julian Cottage, Harrow, was conveyed to the Governors. Though no trusts or purposes were expressed on the face of this

conveyance, it was admitted that the cottage was bought for equipment and use as a school sanatorium.

The conveyance was not attested by two witnesses nor was it enrolled as required by the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 4, sub-ss. 6, 9, so that prima facie it was void under sub-s. 1.

By an agreement of May 21, 1926, the Governors, having found the cottage unsuitable for a sanatorium, agreed to sell it to their tenant, the purchaser, for 6000*l.* Some time before November 11, 1926, the conveyance to the Governors was recorded in the books of the Board of Education, and on January 11, 1927, the Board authorized the present sale.

On December 13, 1926, the purchaser issued this summons for a declaration that the conveyance to the vendors of October 14, 1920, was void for non-compliance with the Mortmain and Charitable Uses Act, 1888, and that a good title had not been shown.

The vendors relied on the Education Act, 1918, s. 46, which (sub-s. 1) exempts any assurance of land for educational purposes from the restrictions of the Mortmain and Charitable Uses Act, 1888, but (sub-s. 3) requires it to be recorded in the books of the Board of Education. This section is reproduced in the 1921 Consolidation Act—namely, Education Act, 1921, s. 117. These and other sections mentioned in the arguments are sufficiently set out in the judgment.

Greenland for the purchaser. The Education Acts of 1918 and 1921 only apply to a national system of public education established and conducted by a local education authority, i.e., elementary and continuation schools. They do not mention the Public Schools Acts, and the expression "public school" is only mentioned incidentally in the Education Act, 1921, s. 170, sub-s. 13, which provides that "The expression 'child,' except in relation to public school accommodation, means, etc." It is perhaps alluded to in sub-s. 17, which provides that "The expression 'trust deed' includes any instrument regulating the trusts or management

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of a school or college." On the whole tenor of the Acts, however, it is clear that they do not apply to public schools.

Even if I am wrong on this general point I still say that in these Acts "education" means instruction of the mind or anything directly ancillary thereto, and does not include the provision of a sanatorium. There is no direct authority, but the meaning of the word "education" was discussed in *Hadfield* v. *Liverpool Corporation.* (1)

Sanger for the vendors. The Education Acts, 1918 and 1921, though mainly dealing with elementary and continuation schools, are not confined to them. For instance, ss. 27, 28, 45 and 47 of the Education Act, 1918, are obviously of general application. Again, s. 46, on which we rely for our exemption, is obviously general. It is reproduced by s. 117 of the Education Act, 1921. The generality of this exemption is recognized by s. 29, sub-s. 4, of the Settled Land Act, 1925 (15 Geo. 5, c. 18), which contains a similar exemption of assurances for charitable uses and provides that the sub-section does not apply to assurances required by s. 117 of the Education Act, 1921, to be sent to the Board of Education.

The Board of Education, established by the Board of Education Act, 1899 (62 & 63 Vict. c. 33), has taken the place of the Charity Commissioners in matters relating to education; and it is fairly obvious that the Legislature in enacting s. 29, sub-s. 4, of the Settled Land Act, 1925, as a complement to the Education Act, 1921, s. 117, thought they had already completely provided for assurances for educational purposes. The Education Acts therefore apply to public schools.

In the case of public schools or universities the word "education" is used in its broad sense: *Hadfield* v. *Liverpool Corporation* (1), and certainly includes the provision of a sanatorium.

ASTBURY J. [after stating the facts:] The only real issue is whether the vendors are exempted from the attestation

(1) (1899) 80 L. T. 566, 567b, 568a.

and enrolment requirements of the Mortmain and Charitable Uses Act, 1888, s. 4, sub-ss. 6, 9. That depends on whether s. 46 of the Education Act, 1918, applies to Harrow and other public schools.

The purchaser contends that the Education Act, 1918, only applies to elementary and continuation schools and does not extend to public schools. The title, however, "An Act to make further provision with respect to education in England and Wales and for purposes connected therewith," is perfectly general, and although the Act mainly deals with elementary and continuation schools, there are a few general sections.

For instance, s. 27 provides that if the governing body of any school or educational institution "not liable to inspection by any Government department," or, if there is no governing body, the headmaster, requests the Board of Education to inspect the school or institution and to report thereon, the Board of Education may do so, if they think fit, free of cost. That is obviously quite a general provision.

Again, s. 28, sub-s. 1 (*a*), provides that in order that full information may be available as to the provision for education and the use made of such provision in England and Wales, it shall be the duty of the responsible person as hereinafter defined, in respect of every school or educational institution "not in receipt of grants from the Board of Education," to furnish to the Board of Education the particulars therein mentioned. That is perfectly general, and applies to Harrow, which is not in receipt of any such grant.

Then there is a group of sections—namely, ss. 45, 46, 47, relating to educational trusts. Sect. 45, sub-s. 1, provides that His Majesty may by Order in Council constitute and incorporate with power to hold land without licence in mortmain "one or more official trustees of educational trust property," and may apply to those trustees the provisions of the Charitable Trusts Acts, 1853 to 1914, relating to the official trustee of charity lands and the official trustees of charitable funds so far as they relate to

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endowments held for or applicable to "educational purposes." That is of general application.

Sect. 47, dispensing with the approval of the Board of Education to the appointment of new trustees under a scheme, is again perfectly general.

Sect. 46, the intermediate and crucial section in the present case, provides (sub-s. 1) that "any assurance, as defined by s. 10 of the Mortmain and Charitable Uses Act, 1888, of land . . . . for educational purposes, whether made before or after the passing of this Act, shall be exempt from any restrictions of the law relating to Mortmain and Charitable Uses, and the Mortmain and Charitable Uses Acts, 1888 and 1891, and the Mortmain and Charitable Uses Act Amendment Act, 1892, shall not apply with respect to any such assurance."

Sub-s. 3 provides that "every assurance of land . . . . for educational purposes, including every assurance of land to any local authority for any educational purpose or purposes for which such authority is empowered by any Act of Parliament to acquire land, shall be sent to the offices of the Board of Education in London for the purpose of being recorded in the books of the Board as soon as may be after the execution of the deed or other instrument of assurance."

The purchaser contends that this section only refers to elementary and continuation schools. But the words are perfectly general, and if, as I hold, it applies to public schools, the purchaser's objection fails.

These provisions are reproduced in s. 117 of the Education Act, 1921, which in many respects deals with education generally.

In 1899 the Board of Education Act, 1899, was passed. By s. 1, sub-s. 1, the Board of Education was established and "charged with the superintendence of matters relating to education in England and Wales." By s. 2, sub-s. 2, and Orders made thereunder, the powers of the Charity Commissioners in matters relating to education were transferred to the Board.

Sect. 29, sub-s. 4, of the Settled Land Act, 1925, provides that every assurance of land within the meaning of s. 4 of the Mortmain and Charitable Uses Act, 1888, shall, in place of the attestation and enrolment requirements prescribed by sub-ss. 6 and 9 of that section, be sent to the offices of the Charity Commissioners within six months after the execution thereof, or within such extended period as the Commissioners may allow, for the purpose of being recorded in the Commissioners' books. It also provides that this sub-section does not apply to assurances or instruments required by s. 117 of the Education Act, 1921, to be sent to the Board of Education, and only applies to instruments executed after the commencement of this Act. It is plainly the policy of the Legislature that assurances of land for charitable purposes shall no longer require attestation and enrolment under the 1888 Act, and the fact that the general provision of s. 29, sub-s. 4, refers to the similar provision of s. 117 of the Education Act, 1921, is a statutory recognition that that section and its predecessor, s. 46 of the 1918 Act, were intended to be of general application to assurances of land for educational purposes.

Now having regard to the Charter, Statutes, and Scheme, any land acquired by the Harrow School Governors is prima facie acquired for educational purposes—i.e., unless the contrary is established. In the present case the cottage was acquired for a sanatorium—i.e., for educational purposes in the broad sense.

If the governors of a public school like Harrow really bought land for non-educational purposes, a different question might arise, because those purposes might not be charitable. I am told it is the common practice of public schools to buy land when it comes into the market, and hold it for their general purposes. It is not desirable for me in this case to throw any doubt on the validity of any such transaction. All I have to do here is to hold that this cottage was acquired for educational purposes.

The only question therefore is whether s. 46 of the Education Act, 1918, re-enacted by s. 117 of the Education Act.

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1921, applies to public schools. In my opinion it does apply. There will therefore be a declaration that a good title is shown, and the purchaser must pay the costs.

Solicitors: *Rehder & Higgs; Young, Jackson, Beard & King.*

G. R. A.

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[1926. M. 302.]

Bankruptcy—Set-off—Right to set off equitable against legal Debt—Equitable Assignment of Debt—Claim for Salary—Excess Profits Duty—Disallowance of Directors' Remuneration—Right of Taxpayer to recover Duty—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 31—*Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6—*Finance Act*, 1916 (6 *&* 7 *Geo.* 5, *c.* 24), *s.* 49.

Bankruptcy jurisdiction proceeds upon equitable principles and draws no distinction between equitable and legal rights for the purposes of administration; and, therefore, a defendant is entitled under s. 31 of the Bankruptcy Act, 1914, to set off against a legal debt claimed by a trustee in bankruptcy an equitable debt due to him from the bankrupt, both debts being in existence before the date of the receiving order.

ACTION by trustee in bankruptcy.

A company named Burrup, Mathieson & Sprague, Ld., which was incorporated in 1905, and carried on the business of manufacturing stationers and printers, on May 14, 1923, entered into an agreement with a trustee for the defendant company (then intended to be formed) for the sale of its business and assets to the defendant company, which was incorporated on June 6, 1923, and adopted the agreement. In pursuance of that agreement, the old company by deed, dated June 15, 1923, assigned to the defendant company the whole of its assets, which included (inter alia) all book and other debts due to the old company on January 31, 1923, or to become due after that date and the full benefit

of any security for such debts, the whole of which were specified in the books of account of the old company and all other property, if any, to which the old company was entitled in connection with its business: and in further pursuance of the agreement, by the same deed the defendant company covenanted with the old company to pay and discharge all the debts and liabilities of the old company and to indemnify the old company against any claims made in respect thereof. The agreement for sale of May 14, 1923, provided by clause 10 thereof that the agreement by the defendant company to pay and discharge all the debts and liabilities of the old company should not release any of the then directors of the old company from any liability they might be under (see Finance Act, 1916, s. 49) to the old company in respect of all sums which the old company should have paid or should be called upon to pay for Government taxes under the Finance Acts, 1915 to 1922.

On June 15, 1923, Gerard J. Mathieson, who had been a director of the old company, entered into an agreement with the defendant company whereby it was agreed that he should serve the defendant company for five years from June 15, and that the company should during that period employ him as a technical expert in their business and pay him a salary at the rate of 500*l.* per annum by equal monthly instalments.

On August 5, 1925, a receiving order was made against Mathieson, and on August 26 he was adjudicated bankrupt.

No express notice in writing of the assignment to the defendant company was given either to the bankrupt or to the plaintiff.

At the date of the agreement of May 14, 1923, negotiations were on foot between the old company and the Inland Revenue Commissioners with regard to its liability for excess profits duty for the years 1915 to 1921. It was ascertained that the sum of 3000*l.* was the amount of the balance due to the Commissioners for the accounting period which ended June 30, 1920, and notice of assessment at that sum with a demand to pay the same was given to the old company on

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June 12, 1922. This liability to excess profits duty arose entirely through disallowances by the Commissioners of the sum of 8791*l.* remuneration credited to the bankrupt for the year ending June 30, 1920, in excess of the 2000*l.* allowed by the statute.

The whole of the 3000*l.* so demanded was paid off by instalments by the defendant company to the Inland Revenue Commissioners between February 26, 1924, and December 31, 1925, of which 2150*l.* was paid before the date of the receiving order. The receipts for those instalments were issued by the Commissioners to the old company, to whom and its liquidator and not to the defendant company, the Commissioners looked for payment.

On January 27, 1926, the plaintiff, as the trustee in bankruptcy of Mathieson, issued a writ against the defendant company claiming payment of a sum of 1250*l.* in respect of arrears of salary up to December 15, 1925, under his service agreement with them. The defendants pleaded a right to set off against the sum so claimed the said sum of 2150*l.*, the amount of excess profits duty paid by them up to the date of the receiving order.

Edward Clayton K.C. and *Tindale Davis* for the plaintiff. The assignment of the book debts of the old company to the defendant company did not include the right which the old company then had against Mathieson under his liability (preserved to the old company by clause 10 of the agreement) to be recouped the excess profits duty. The book debts assigned were only those which were specified in the books of the old company. The right of the old company against Mathieson was only a right to be indemnified when the company were called upon to pay the duty. Nor did that right pass under the assignment to the defendant company of all "other property" of the old company connected with its business. The liability of Mathieson arose out of a statute, and no cause of action arose until the duty was payable: it was not "debitum in præsenti solvendum in futuro." A right to be indemnified is not property within the meaning

of the assignment. The agreement to pay Mathieson a salary was to pay it "in any event," regardless of any cross obligations on his part, so that those words negatived any right of set-off, as was the case in *Phœnix Assurance Co.* v. *Earl's Court, Ld.* (1) There was no legal assignment by the old company of a debt or chose in action. Mathieson was no party to the assignment and no express notice in writing of the assignment was given to the debtor, as required by s. 25, sub-s. 6, of the Judicature Act, 1873, since replaced by s. 136 of the Law of Property Act, 1925. Where all the requirements of that sub-section have been observed, it has been decided that the assignment transfers to the assignee the legal right to the debt and places him in the position of the assignor, with the result that such a debt is a proper subject of set-off by the assignee against a debt due from him to the plaintiff: *Bennett* v. *White.* (2) But here, even assuming an assignment of a debt, owing to the absence of an express notice in writing to the debtor, the defendant company has no legal right capable of being the subject of set-off, under s. 31 of the Bankruptcy Act, 1914. Upon the proper construction of s. 49 of the Finance Act, 1916, the right of the defendant company against Mathieson to be recouped the duty did not arise until the whole amount of the duty had been paid. At the date of the receiving order, which is the critical time for ascertaining the existence of mutual debts, the whole amount of the duty for which the taxpayer was liable had not been discharged: only a part of it had then been paid. Sect. 49 indicates that there is no debt until the whole of the duty has been paid: *Thompson Brothers & Co.* v. *Amis.* (3) At the date of the agreement by the old company to assign its debts there was no debt owing by Mathieson to the old company. That company had, at that date, at most, a contingent claim against Mathieson in respect of the duty. There was then no certainty of any claim being made. Mathieson's liability, such as it was, was kept on foot by clause 10 of the agreement.

(1) (1913) 30 Times L. R. 50. (2) [1910] 2 K. B. 643.
(3) [1917] 2 Ch. 211, 220.

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By the provision in the service agreement that salary should be paid "in any event" it was intended that so long as the claim of the old company remained contingent and had not ripened into a debt the salary was nevertheless to be paid: *Watson* v. *Mid-Wales Ry. Co.* (1)

Archer K.C. and *Andrewes-Uthwatt* for the defendants. There were here mutual debts existing at the date of the receiving order within s. 31 of the Bankruptcy Act, 1914, notwithstanding the fact that one of them happens to be an equitable debt. There seems to be an absence of authority on the point in question. As part of the consideration for the sale, the defendant company covenanted to pay and discharge the debts and liabilities of the old company and to indemnify the old company in respect thereof; and it was agreed that that covenant should not release Mathieson from his liability to recoup the taxpayer under s. 49 of the Finance Act, 1916. The defendant company as assignees of the old company, by paying the duty, notwithstanding the fact that the old company and not the defendant company were actually assessed by the Commissioners, were only doing what they were bound to do under their covenant with the old company; and the fact that the assessment was upon the old company could not affect the liability of the defendant company under their covenant: *Wankie Colliery Co.* v. *Inland Revenue Commissioners.* (2) Liability to pay does not depend upon assessment: *Whitney* v. *Inland Revenue Commissioners* (3), per Lord Dunedin. The claim here to be recouped is in substance a claim by the defendant company by virtue of the assignment to them, so that there are real cross debts. At the time of the assignment to the defendant company, Mathieson was under a liability to the old company to recoup the duty paid in respect of any disallowances under s. 49. The corresponding right of the old company to be so recouped having been assigned to the defendant company and Mathieson having simultaneously entered into an agreement with that company

(1) (1867) 36 L. J. (C. P.) 285. (2) [1922] 2 A. C. 51, 65.
(3) [1926] A. C. 37, 52.

to serve them for a salary, there are imported into the transaction all the elements necessary to bring it within the operation of s. 31 of the Bankruptcy Act, 1914. At the date of the assignment Mathieson's liability was not a mere contingent liability towards the old company, but he was in the position of a debtor and became a debtor in respect of each instalment of the duty, as and when it was paid; and at the date of the receiving order that debt exceeded the amount of the salary which was then owing to him from the defendant company. The Court will have regard to cross equities existing between the parties: *Forster* v. *Wilson.* (1)

CLAUSON J. [after stating the facts, continued:] Mr. Archer, for the company, suggested that by reason of certain statutes to which he referred me there was a direct liability by Mr. Mathieson to recoup the new company; and of course the case would be very much simplified, if that were the position. It is not necessary for me to express any view upon that matter, and I abstain from doing so, because, in the view I have taken of another point which arises, it is not necessary for me to deal with that matter. Accordingly, there is nothing that I have said in the course of the argument or that I say now, which is any authority upon any such question as that which Mr. Archer raised.

There is this position unquestionably, that at the time when the new company took over the old company's assets and liabilities, there was, as between the director and the old company, a liability upon the director to make a recoupment in respect of excess profits duty to the old company The corresponding right of the old company against the director was part of the property of the old company and, as such, it was transferred by way of assignment to the new company by the assignment which I have mentioned. It was so transferred by way of equitable assignment, for a right of that kind vested in the old company against the director could not be assigned at law, except under the

(1) (1843) 12 M. & W. 191.

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Judicature Act, and that would have involved certain notices in writing, which have not been given. Accordingly, at the time of the adjudication the claim of the old company against the director in respect of this recoupment was a claim which was vested in the new company in equity and not at law.

Now Mr. Clayton, who has given me the greatest assistance in this case, has admitted that, assuming there had been an assignment of this liability perfected at law from the old company to the new company, the position at the moment the bankruptcy commenced would be this: a legal claim by the director against the new company for salary; and on the other hand a legal claim by the new company against the director to be recouped the sum in question. If that had been the state of the facts, it would have been impossible to contend that s. 31 would not apply, and there would have been a set-off—a set-off, I may observe, under the Bankruptcy Act having nothing whatever to do with the legal set-off créated by the statutes of set-off. It was pointed out, however, and pointed out very truly, that that was not the position, because the assignment here being an equitable assignment, the company were seeking to set off their equitable claim under the assignment against the legal claim of the plaintiff for salary.

It is said—I do not doubt accurately—that, if I now decide that an equitable claim is in the same position for purposes of set off, under the mutual credits section, as if it were a legal claim, I shall be deciding a point which is not directly covered by any clear authority appearing in the books. My attention was drawn by Mr. Clayton to the case of *Bennett* v. *White* (1), but I do not think it throws any light on the matter I have to consider. It was in that case being considered in a Court of law, whether the legal set-off provided by the statutes of set-off extended to set-off of a debt which had been assigned under the provisions of the Judicature Act and accordingly had become a legal debt owing to the assignee. There was some discussion on the term "mutual."

(1) [1910] 2 K. B. 643.

I confess that I have found no assistance from that case.

On principle it appears to me that the mere fact that the debt is an equitable debt, and not a legal debt, has no bearing at all on the question whether it is available for the purpose of set-off under s. 31. The Bankruptcy Act, as I understand it, is an Act regulating the proceedings of a Court which has always been a Court of equity, proceeding on equitable principles, recognizing equitable debts, subject of course to such infirmities as are sometimes present, but drawing no distinction between equitable and legal rights for purposes of administering the estate of the bankrupt. I think, at this time of day, it would be very unfortunate, if it were held that a Court of Bankruptcy is in any way fettered by any such distinctions, except so far as any Court of equity is fettered by the fact that certain infirmities may in certain circumstances attach to equitable rights as compared with corresponding legal rights. Accordingly I decide that this set-off claimed by the defendants is a good set-off and is operative to overtop the claim which has been made by the plaintiff in his action.

One more point I have to mention. There was a contention raised, on which I expressed my view in the course of the argument, and to make the matter as complete as I can I will express it once more. The agreement under which the salary was claimed gives the right to salary in these terms: "The company shall from"—such and such date to such and such dates—"pay to Mr. Mathieson in any event a salary at the rate of 500*l.* per annum." What those words "in any event" mean, I am not quite clear. I am told that if I could look at the surrounding facts, the matter would be clarified. I am not permitted to do that and must take the words as they stand. I am, however, clear that those words do not have, and are not intended to have, the effect of excluding the company from any right of set-off against the salary which may be given to them by any provisions of the law of the land. Accordingly, as far as this case is concerned, I regard those words "in any

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event" as wholly inoperative for any purpose with which I have to deal.

Under those circumstances the result of the action is that the claim by the trustee for salary fails, because it is overtopped by the defendants' claim to set-off.

Solicitors: *Gush, Phillips, Walters & Williams; Wild, Collins & Crosse.*

H. C. H.

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March 9, 10.

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FLINT *v.* FLINT.

[1926. F. 1863.]

Law of Property—Transitional Provisions—Undivided Shares—Statutory Trusts—Right of Pre-emption given by Will-Settlement—Whether effective against statutory Trusts—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 3; *s.* 28, *sub-s.* 1; *s.* 35; *s.* 205, *sub-s.* 1, *cl. x.—Sch. I., Part* 4, *s.* 1, *sub-s.* 9—*Law of Property* (*Amendment*) *Act*, 1926 (16 & 17 *Geo.* 5, *c.* 11), *Schedule.*

A testator who died in 1920 gave his property to trustees, and settled the entirety upon trust for various beneficiaries in undivided shares. He empowered the trustees at any time to sell any part of his estate, subject to a right of pre-emption thereby given to his son Alfred over Property A at a price to be fixed by the trustees' valuer before sale.

On January 1, 1926, the land vested in the trustees on the statutory trusts for sale, etc., under Sch. I., Part 4, s. 1, sub-s. 3, of the Law of Property Act, 1925:—

Held, on the construction of the will, that the right of pre-emption was only intended to attach to an exercise of the power of sale under the will, and not to a sale under the statutory trusts or any other extraneous powers.

Held, also, that, even if the right of pre-emption was intended to attach to any sale whatever by the trustees, it was not enforceable against the statutory trusts of s. 35 either as an "equitable interest or power" within s. 3 and s. 205, sub-s. 1, cl. ix.; or as an "additional or larger power" conferred by the will on the trustees within s. 28, sub-s. 1, as amended by the 1926 Act Schedule; or as an "incumbrance" within Sch. I., Part 4, s. 1, sub-s. 9.

Held, therefore, that the trustees on executing the statutory trusts could disregard the right of pre-emption.

ORIGINATING SUMMONS.

By his will dated October 23, 1917, the testator, after appointing his wife, his son Alfred, his daughter Ada and

C. F. Arnold executors, trustees and Settled Land Act trustees and bequeathing certain legacies, devised and bequeathed the residue of his real and personal estate to his trustees upon trust to receive the income during his wife's life and thereout (after discharging outgoings) to pay his wife 660*l.* a year for life and then to pay his two daughters 100*l.* a year each for life (increased to 120*l.* by a codicil) and to divide the remainder of the income and any accrued income equally among the testator's children with a proviso that if any child predeceased the testator or his wife leaving children the share of the income that the deceased child would have taken if living should go to those children during the wife's life, but if the deceased child left no children living at the testator's death or at his wife's death the share of income should accrue to the other shares.

After empowering the trustees to allow his wife to occupy his residence on certain conditions including a reduction of her annuity to 600*l.* during that residence the testator directed that after his wife's death the trustees should hold his trust estate in trust to pay the net income amongst all his children so that no spinster daughter should receive less than 200*l.* annually (increased by a codicil to 240*l.* and to 360*l.* for the surviving spinster), with similar provisions as before for substitution or accruer in the case of children predeceasing the testator or his wife, varied by a provision for deceased sons' widows (except Frank's then present wife).

After the death of his last surviving child the testator directed his trustees to sell his residuary estate and to hold the proceeds upon trust to pay any son's widow (with the same exception) one-eighteenth of those proceeds and to divide the remainder amongst the testator's grandchildren living at the death of his surviving child. The testator also declared that his trustees should have power at any time in their sole discretion to sell the whole or any part of his estate at such price and upon such terms as they thought fit. He further declared that before selling certain freehold property hereinafter called "Property A" it should be first offered to his son Alfred at a price to be fixed by

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the trustees' valuer, and if he would give the price so fixed, Property A should be sold to him and he might purchase although a trustee.

After giving his trustees general powers of leasing and management the testator declared that his son Alfred although a trustee might take a lease of Property A or any part thereof for such term as the trustees (exclusive of Alfred) might think proper at a rent to be fixed by a valuer employed by the trustees (exclusive of Alfred) and upon such covenants and conditions as the trustees (other than Alfred) thought right. The testator also declared that it should be lawful for his son Alfred to purchase Property A either by public auction or private treaty, although he was an executor and trustee.

The testator died on February 7, 1920, leaving his widow, his two daughters Ada and Florence, his three sons Frank, Walter, and Alfred, and the widow and children of a deceased son William. The daughter Florence died on February 14, 1920, unmarried, and the son Frank died on August 13, 1924, leaving no issue. Ada was still a spinster.

On January 1, 1926, the land, being settled land held in equity in undivided shares vested in possession, vested in the trustees on the statutory trusts for sale, etc., under the transitional provisions of Sch. I., Part 4, s. 1, sub-s. 3, of the Law of Property Act, 1925. It was admitted that having regard to the devolution of the property in undivided shares the new s. 4 of Part 4 added by the Law of Property (Amendment) Act, 1926, Schedule (1926 Statutes, p. 65), had no application to this case.

On December 1, 1926, the trustees other than Alfred issued this summons to determine :—

1. Whether upon the true construction of the will and having regard to the Law of Property Act, 1925, the Law of Property (Amendment) Act, 1926, and the Settled Land Act, 1925, Alfred was entitled to require the trustees before executing the statutory trust for sale to offer Property A to him at a valuation as mentioned in the will ; and whether in the event of that offer being declined the trustees were

at liberty to sell to other persons by public auction or private treaty at a lower price.

2. Whether on the exercise of the statutory trust for sale Alfred, although a trustee, was still entitled under the will to purchase Property A (*a*) by public auction or (*b*) by private treaty.

3. Whether the trustees still had power under the will to let Property A to Alfred, although a trustee.

Beebee for the independent trustees.

Topham K.C. and *Greenland* for Alfred. The governing scheme of the Law of Property Act, 1925, is to vest the legal estate in the estate owner but to preserve all equitable interests and powers.

Under Sch. I., Part 4, s. 1, sub-s. 3, as amended by the 1926 Act Schedule, the land is now vested in the trustees upon the statutory trusts free from incumbrances affecting the entirety not secured by a legal mortgage and "free from any interests, powers, and charges subsisting under the settlement, which have priority to the interests of the persons entitled to the undivided shares" (1926 Statutes, p. 64).

At first sight that seems against Alfred's right of pre-emption. But it is not really so, as he claims under the statutory trusts. These are defined by s. 35. The trustees are to sell the land and hold the proceeds upon the trusts requisite for giving effect to the rights of the persons interested in the land. The manner of giving effect to "equitable interests or powers" in or over the land is stated in s. 3. They have already been mentioned in s. 1, sub-ss. 7, 8.

Now Alfred's right of pre-emption is an "equitable interest or power" perhaps capable of being overreached in favour of a purchaser under s. 2, sub-s. 1, cl. ii. (1), but otherwise entitled to be given effect to under s. 2, sub-s. 4, and s. 3. Alfred is really entitled to call for the legal estate under s. 3, sub-s. 3.

(1) See sub-s. 3, cl. iv.

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The duty of offering Property A to Alfred before selling it is in the nature of an additional or larger power conferred on the trustees under s. 28, sub-s. 1, as amended by the 1926 Act (1926 Statutes, p. 62).

Again, as the equitable owner of a right of pre-emption, Alfred is in the position of an incumbrancer, and the trustees cannot sell without his consent: see Sch. I., Part 4, s. 1, sub-s. 9.

[ASTBURY J. He is not an incumbrancer within sub-s. 9.]

Similar provisions for the enforcement of equitable interests and powers against the estate owner are contained in s. 16 of the Settled Land Act, 1925 (15 Geo. 5, c. 18). That section was considered in *In re Egerton Settled Estates.* (1)

Wilfrid Hunt for the residuary legatees. First, on the construction of the will the right of pre-emption only arises on an exercise of the power of sale in the will. The future trust for sale after the death of all the children including Alfred is quite unfettered. It is only the auxiliary power of sale to arise at any time that is fettered. That power has not and cannot now be exercised, so the right of pre-emption will never arise.

Secondly, even if the testator intended to impose a fetter on all sales, it would have been void against a sale by the lifetenants under their statutory powers. Surely it must be equally void against a sale under the statutory trusts.

This right of pre-emption is not like the case of a paramount incumbrance, as in *In re Egerton Settled Estates.* (1) It is at most an equitable interest or power created by the very will-settlement under which the statutory trusts have arisen. That is not an equitable interest or power within s. 3, and it is certainly not an additional or larger power conferred on the trustees within s. 28, sub-s. 1, as amended.

Sch. I., Part 4, s. 1, sub-s. 9, by requiring the consent of an incumbrancer to the exercise of the statutory trust for sale really shows that in the absence of such an incumbrancer everything is overridden. Alfred is clearly not an incumbrancer within sub-s. 9.

(1) [1926] Ch. 574, 578.

Topham K.C. in reply. The testator could not of course foresee the statutory trusts, but he clearly intended the right of pre-emption to attach to any sale by the trustees during Alfred's life. Why should it not attach to a sale by them under the statutory trusts? The question is not whether the purchaser will get a good title, if the trustees choose to sell without regard to the right of pre-emption, but whether they are justified in ignoring that equitable interest or power expressly conferred by the will. That is an entirely different question, which must not be confused with the former question.

ASTBURY J. [after stating the facts:] It is not disputed that before the commencement of the Law of Property Act, 1925, the land, including Property A, was held in equity in undivided shares vested in possession, and being settled land on January 1, 1926, it vested in the will trustees on the statutory trusts under Sch. I., Part 4, s. 1, sub-s. 3.

Alfred, however, contends that before selling Property A under these statutory trusts the trustees are obliged to offer it to him at a valuation. The other beneficiaries contend that his option or right of pre-emption only affected a sale under the power or trust in the will and does not attach to a sale under the statutory trusts. The power of sale was an independent power to sell at any time. It was not part of the will trust for sale which has not yet arisen and the power of sale has not been exercised. Prima facie on the true construction of the will the direction to offer Property A to Alfred at a valuation before selling it is limited to a sale under the power or trust in the will. If so, there is an end of the present question.

But, as Alfred contends that the direction is perfectly general and extends to any sale of Property A by the trustees, I will also deal with the case on that footing.

In the first place most of the beneficiaries under the will had lifetenant powers, and it would be impossible to contend that the pre-emption direction could have interfered with the exercise of those powers. In other words, those powers

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if exercised would have defeated the right of pre-emption. Assuming therefore that this direction was a general direction attaching to any sale by the trustees, though not to a sale by the lifetenants, the question arises whether it can affect a sale by the trustees under the statutory trusts.

Now s. 35 provides that land held upon the "statutory trusts" shall be held upon trust to sell the same and to stand possessed of the net proceeds and of the net rents and profits until sale upon the trusts and subject to the powers and provisions "requisite for giving effect to the rights of the persons (including an incumbrancer of a former undivided share or whose incumbrance is not secured by a legal mortgage) interested in the land."

Prima facie this direction is absolute and complete, and it is difficult to see how the direction to give effect to the rights of persons interested in the land can apply to a person with a mere right of pre-emption unless there is something else in the statute giving effect to that right.

Now s. 2, sub-s. 1, provides that a conveyance to a purchaser of a legal estate in land shall overreach any "equitable interest or power" affecting that estate, whether or not he has notice thereof, if (ii.) the conveyance is made by trustees for sale and the "equitable interest or power" is at the date of the conveyance capable of being overreached by such trustees under sub-s. 2 or independently.

Sect. 28, sub-s. 1, as amended by the 1926 Act Schedule (1926 Statutes, p. 62), provides that trustees for sale shall in relation to land and to the proceeds of sale, have all the powers of a lifetenant and the trustees of a settlement under the Settled Land Act, 1925, including in relation to the land the powers of management conferred by that Act during a minority, and where by statute settled land is or becomes "vested in the trustees of the settlement upon the statutory trusts," such trustees shall also have the "additional or larger powers" (if any) conferred by the settlement on the lifetenant, statutory owner, or trustees of the settlement.

Alfred contends that in some way his right of pre-emption is an additional or larger power conferred on the trustees within this sub-section and therefore attaches to the statutory trusts. So far, however, from being an additional power, it is a restriction on the trust or power of sale in the will. This point is therefore unsound.

Alfred next relies upon s. 3, sub-s. 1, which provides that "all equitable interests and powers" in or over land shall be enforceable against the estate owner of the legal estate affected in manner following (that is to say): (*b*) where the legal estate affected is vested in trustees for sale—(ii.) where, by reason of the exercise of "any equitable power" or under any trust affecting the proceeds of sale, any person of full age becomes entitled to require a legal estate in the land to be vested in him in priority to the trust for sale, the trustees for sale shall (if so requested in writing) be bound to transfer or create such legal estates, to take effect in priority to the trust for sale, as may be required for giving legal effect to the rights of the person so entitled.

Alfred contends that the above sub-section entitles him if he desires to exercise his right of pre-emption to call for the legal estate in Property A in priority to the statutory trust for sale. I am, however, unable to read into the sub-section any language entitling Alfred in this case to any right of pre-emption against the statutory trusts. Even under the will the right of pre-emption is not a right that is prior to the trust or power of sale. It only arises on the exercise of that trust or power. The above sub-section has therefore no application.

Alfred next relies on s. 3, sub-s. 3, which provides that where, by reason of a statutory or other right of reverter, or of an "equitable right of entry taking effect, or for any other reason," a person becomes entitled to require a legal estate to be vested in him, then and in any such case the estate owner whose estate is affected shall be bound to convey or create such legal estate as the case may require. That applies to a wholly different class of case and has no application here.

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Now Alfred's right of pre-emption cannot be satisfied out of the proceeds of sale under s. 35. He contends, however, that s. 35 must be read subject to s. 3, which provides for the enforcement of equitable interests and powers against the estate owner. That is correct in so far as the section provides for the satisfaction of rights paramount to those of the statutory trustees. But s. 3, sub-s. 1 (*b*) (i.), which is very similar to s. 35, provides that where the legal estate affected is vested in trustees for sale the trustees shall stand possessed of the net proceeds of sale and of the net rents and profits of the land until sale upon the trusts and subject to the powers and provisions "requisite for giving effect to the equitable interests and powers affecting the same respectively, of which they have notice, and whether created before or after the disposition upon trust for sale, according to their respective priorities."

Now turning to the definition section—s. 205, sub-s. 1, cl. x.—we find that "Legal estates" mean the estates, interests and charges, in or over land (subsisting or created at law) which are by this Act authorized to subsist or to be created as legal estates; "equitable interests" mean all the other interests and charges in or over land or in the proceeds of sale thereof.

In my opinion therefore Alfred's right of pre-emption is not a paramount equitable interest within s. 3 or s. 35. He admits that s. 35 read by itself would overreach him, but relies on the limitation in s. 3. But as I have already said, the right of pre-emption is not a paramount equitable interest within s. 3. It is therefore overridden by the statutory trusts.

I am quite unable to appreciate how the statutory trusts which displace the trust or power of sale in the will can be in any way affected by directions to the trustees merely relating to that trust or power. Why the Legislature should think it necessary to interfere with the carrying out of the ordinary trusts of the will it is not in my province to conjecture. But in my opinion the statutory trustees are not bound to offer Property A to Alfred at a valuation

before exercising their statutory trust for sale. They may, however, sell or let it to him in spite of his trusteeship provided that such sale or letting is carried out by the trustees excluding Alfred.

Solicitors: *Kingsford, Dorman & Co.*

G. R. A.

In re BOOTH AND SOUTHEND-ON-SEA ESTATES COMPANY'S CONTRACT.

[1927. B. 69.]

Settled Land—Charity—Trust Deed—Sole Trustee—Complete Powers—Property all Revenue—Sale of Land—Receipt of Purchase Money—Whether two Trustees necessary—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *ss.* 29, 94.

Sect. 29, sub-s. 1, of the Settled Land Act, 1925, provides that "For the purposes of this section" all land vested in trustees for charitable purposes shall be deemed to be settled land and the trustees shall have lifetenant and settlement-trustee powers. "In connexion only with the exercise of those powers, and not so as to impose any obligation in respect of or to affect" (*a*) the mode of creation or the administration of those trusts; or (*b*) the appointment or number of trustees of those trusts; the instrument creating the trust shall be deemed the settlement and the trustees shall be deemed the trustees of the settlement.

Sect. 94, sub-s. 1, provides that "capital money arising under this Act" shall not be paid to fewer than two persons as trustees of a settlement.

The trust deed of a charity placed the entire management and control of its property, which, whether land or investments, was all revenue, in the hands of a sole trustee, in whom it was vested with full power to sell and give receipts for the purchase money:—

Held, that the trustee could sell the land under his trust deed and give a receipt for the purchase money without resorting to his lifetenant powers under s. 29 at all.

Held, also, that in any case the proceeds of sale would remain revenue and would not become capital moneys arising under the Act.

Held, therefore, for both these reasons that s. 94, sub-s. 1, had no application.

VENDOR AND PURCHASER SUMMONS.

The vendor, General Booth, was General of the Salvation Army and as such sole Director of the Darkest England

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Scheme, a charity supported partly by voluntary contributions. Under the trusts regulating the Salvation Army there could be only one General for the time being.

The trusts of this Scheme were declared by a Deed Poll of January 30, 1891, under the hand and seal of a former General.

Clause 1 provided that all money and property received for the purposes of the Scheme and the land, investments, and property for the time being representing the same should at all times be held and applied upon trust for the charitable objects therein set forth as the General for the time being thought fit.

Clause 2 provided that the Scheme should at all times be under the direction and control of the General for the time being, and he should be called the Director of the Scheme. It should be his duty to conserve the same and the trust property for the objects therein mentioned, keeping the property distinct from that of the Salvation Army. All conveyances made to him for the purposes of the Scheme were to be expressly made to him as Director thereof.

Clause 3 provided that the General, in his capacity as Director of the Scheme, should have power to expend invest or otherwise dispose of or deal with for the purposes of the Scheme all moneys or other property received for the general purposes of the Scheme and should have power to purchase or acquire any real or personal property and to sell the same and give good receipts for the purchase money, and that no purchaser should be concerned to inquire as to the expediency or propriety of the transaction for the purposes of the Scheme.

By a conveyance on sale dated August 25, 1893, Blackacre and other freehold hereditaments were conveyed to the then Director of the Scheme as such. Part of the purchase money was left on mortgage, but the balance was provided out of moneys held for the general purposes of the Scheme.

On September 17, 1926, the present Director, who was also the executor of the late Director last mentioned, contracted to sell Blackacre to the purchasers.

On examining the title the purchasers objected that Blackacre being held on charitable trusts was settled land and that the vendor was a lifetenant under s. 29 of the Settled Land Act, 1925; that the purchase moneys were capital moneys arising under that Act, or must be so treated, and could not therefore be paid to a single trustee, so that the vendor alone could not give a good receipt, and a good title was not made out.

The vendor, on the other hand, contended that the purchase moneys were not capital moneys arising under the Settled Land Act, 1925, or capital moneys at all; that there was no settlement and no lifetenant, and that the vendor could sell under the Trust Deed Poll alone and give a good receipt for the purchase moneys without resorting to s. 29 at all.

On January 6, 1927, the purchasers issued this summons to determine the point. The sections referred to in the arguments are sufficiently set out in the judgment.

Topham K.C. and *Underhay* for the purchasers. Blackacre being charity land, the vendor has lifetenant powers under s. 29, but is not a statutory owner. He is therefore a lifetenant under s. 117, sub-s. 1, cl. xxviii., and the purchase money is capital money arising under the Act within s. 117, sub-s. 1, cl. ii. The receipt of two trustees is therefore necessary under s. 94, sub-s. 1.

The vendor will no doubt contend that he is selling under his Deed Poll and not under the Settled Land Act at all. But under and by virtue of s. 108, sub-s. 2, the powers of that Deed Poll are exercisable as if they were additional powers conferred on the lifetenant by s. 109. Now the proceeds of sale by a lifetenant under his statutory or additional powers so conferred are clearly capital payable to the settlement trustees, and not to him: *In re Norton and Las Casas Contract.* (1)

The Deed Poll is really the trust instrument and the purchasers are not entitled to see it; see s. 110, sub-s. 2. They must be content with the vesting instrument.

(1) [1909] 2 Ch. 59.

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That the receipt of two trustees is necessary in this case appears also from s. 14 of the Trustee Act, 1925 (15 Geo. 5, c. 19). Sub-s. 1 enables one trustee to give receipts, but sub-s. 2 provides that this section does not, "except where the trustee is a trust corporation," enable "a sole trustee" to give a valid receipt for (*b*) "capital money arising under the Settled Land Act, 1925." Under the Law of Property (Amendment) Act, 1926 (16 & 17 Geo. 5, c. 11), s. 3, "trust corporation" now includes certain officials and "any person holding any other official position prescribed by the Lord Chancellor." The present director's office has not yet been so prescribed.

J. H. Stamp for the vendor. Sect. 110, sub-s. 2, has no bearing on s. 29, which expressly says that the purchaser is bound to see that the requisite consents are obtained. Here no consents are necessary, because both Blackacre and its purchase money are revenue: *In re Clergy Orphan Corporation.* (1)

Again, s. 29 is, on the face of it, only an adoptive section in aid of the charity trustees, if they want its powers. It is carefully limited by the introductory words "For the purposes of this section" and later by the words "In connexion only with the exercise of those powers." It is only in that connection that the Deed Poll is made a settlement, and only for the purposes of the section that the vendor has life-tenant and trustee powers.

Now here the vendor can sell Blackacre under his Deed Poll without the aid of s. 29 at all, and there is nothing in s. 29 or any other section of the Act to turn revenue into capital. *In re Norton and Las Casas' Contract* (2) is not in point. The fund was clearly capital. The only question was who could give a receipt for it.

No doubt if the vendor were a compulsory lifetenant and the Deed Poll a settlement for all the purposes of the Act, ss. 108 and 109 would apply, and, if the Act could conceivably convert revenue into capital, s. 94 would apply. As it is, these sections have no application, and the vendor can sell under the Deed Poll alone.

(1) [1894] 3 Ch. 145, 154, 155. (2) [1909] 2 Ch. 59.

ASTBURY J. [after stating the facts:] The matter is of considerable importance. There is no question that under this Scheme moneys are subscribed as revenue and dealt with as such; that they are from time to time invested as occasion may arise in the purchase of land and the making of other investments, but that they do not on such occasions cease to be revenue and applicable as such if and when the Director of the Scheme so decides.

I am not sure whether I can clearly state the purchasers' contentions. They mainly rely on s. 29 of the Settled Land Act, 1925.

Sub-s. 1 provides that "for the purposes of this section" all land vested or to be vested in trustees on or for charitable purposes shall be deemed to be settled land, and the trustees shall, "without constituting them statutory owners," have in reference to the land all the powers which are by this Act conferred on a lifetenant and on the trustees of a settlement.

What the words "For the purposes of this section" exactly mean is difficult to decide. For the purposes of s. 29 Blackacre is unquestionably vested in trustees for charitable purposes and for the purposes of s. 29 it has become settled land, and the vendor, the trustee of it, without becoming a statutory owner, has become entitled to exercise lifetenant powers over it.

The vendor, however, has under his Trust Deed Poll all the powers he requires, and does not seek to exercise any of these lifetenant powers.

Sect. 29 then provides that "In connexion only with the exercise of those powers, and not so as to impose any obligation in respect of or to affect" (*a*) the mode of creation or the administration of such trusts; or (*b*) the appointment or number of trustees of such trusts; the statute or other instrument creating the trust or under which it is administered shall be deemed the settlement, and the trustees shall be deemed the trustees of the settlement, and, save where the trust is created by a will coming into operation after the commencement of this Act, a separate instrument shall not be necessary for giving effect to the settlement. The sub-section

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further provides that any conveyance of land held on charitable trusts shall state that the land is held on such trusts, and, where a purchaser has notice that the land is held on charitable trusts, he shall be bound to see that any consents or orders requisite for authorizing the transaction have been obtained.

Sub-s. 2 provides that the said powers, i.e., the lifetenant powers, shall be exercisable subject to such consents or orders, if any, being obtained as would, if this Act had not been passed, have been requisite if the transaction were being effected under an express power conferred by the instrument creating the trust, and where the land is vested in the official trustee of charity lands or in any other persons having no powers of management, the said powers shall be exercisable by the managing trustees or committee of management, and the official trustee or other persons aforesaid shall not be liable for giving effect to directions given by the managing trustees or committee of management. Then there are certain provisoes to which for the present purpose I need not refer.

Sub-s. 3 provides that nothing in this section affects the jurisdiction of the court, Charity Commissioners, Board of Education, or other competent authority, in regard to the administration of charitable, ecclesiastical, or public trusts.

Sub-s. 4 provides that every assurance of land within the meaning of s. 4 of the Mortmain and Charitable Uses Act, 1888, shall, in place of the requirements respecting attestation and enrolment prescribed by sub-ss. 6 and 9 of s. 4, be sent to the offices of the Charity Commissioners and dealt with as therein provided. The further sub-sections are not relevant.

Sect. 117, sub-s. 1, cl. xxviii., provides that the expression "lifetenant" includes a person (not being a statutory owner) who has the powers of a lifetenant under this Act, and also (where the context requires) one of two or more persons who together constitute the lifetenant or have the powers of a lifetenant.

Sect. 94, sub-s. 1, provides that notwithstanding anything in this Act, "capital money arising under this Act" shall

not be paid to fewer than two persons as trustees of a settlement, unless the trustee is a trust corporation.

The purchasers contend that Blackacre, having become settled land under s. 29 and being held thereunder, the moneys to arise from its sale must be "capital money arising under this Act" within s. 94 and subject to its provisions.

Sect. 117, sub-s. 1, cl. ii., provides that the expression "capital money arising under this Act" means capital money arising under the powers and provisions of this Act or the Acts replaced by this Act, and receivable for the trusts and purposes of the settlement, and includes securities representing capital money. That definition is not of much assistance.

Sect. 95 provides that the receipt or direction in writing of or by the trustees of the settlement, or where a sole trustee is a trust corporation, of or by that trustee, or of or by the personal representatives of the last surviving or continuing trustee relating to any money paid to or by the direction of the trustees, trustee, or representatives effectually discharges the payer therefrom.

Sect. 108, sub-s. 1, provides that nothing in this Act shall take away, abridge, or prejudicially affect any power for the time being subsisting under a settlement, or by statute or otherwise, exercisable by a lifetenant or (save as hereinafter provided) by trustees with his consent, or on his request, or by his direction, or otherwise, and the powers given by this Act are cumulative.

Sub-s. 2 provides that in case of conflict between the provisions of a settlement and the provisions of this Act relative to any matter in respect whereof the lifetenant intends to exercise any power under this Act, the provisions of this Act shall prevail; and, notwithstanding anything in the settlement, any power (not being merely a power of revocation or appointment) relating to the settled land thereby conferred on the trustees of the settlement or other persons exercisable for any purpose, whether or not provided for in this Act, shall, after the commencement of this Act, be exercisable by the lifetenant or statutory owner as if it were an additional power conferred on the lifetenant within s. 109 and not otherwise.

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Sect. 109, sub-s. 1, provides that nothing in this Act precludes a settlor from conferring on the lifetenant or (save as provided by s. 108) on the trustees of the settlement any powers additional to or larger than those conferred by this Act.

Sub-s. 2 provides that any additional or larger powers so conferred shall, as far as may be, notwithstanding anything in this Act, operate and be exercisable in the like manner, and with all the like incidents, effects, and consequences as if they were conferred by this Act, and, if relating to the settled land, as if they were conferred by this Act on a lifetenant.

Now, under these rather complicated provisions, the purchasers say that Blackacre has become settled land, that the powers exercisable by the vendor are exercisable as if they were conferred by the Act, and that the consequences of ss. 94 and 95 thereby result. In substance they say that the power which the vendor has now exercised of selling Blackacre is to be construed as if it were a power exercisable under the Act, and that a power to sell settled land under the Act makes the purchase money capital moneys, because purchase moneys received on a sale of settled land are, for the general purposes of this statute, capital moneys. They also referred to s. 3 of the Law of Property (Amendment) Act, 1926, as to the meaning of Trust Corporation, but I do not think it necessary for the purposes of my decision to deal with that.

There is one other section referred to by the purchasers which I think I should mention in passing—namely, s. 110.

Sect. 110, sub-s. 2, provides that a purchaser of a legal estate in settled land shall not, except as hereby expressly provided, be bound or entitled to call for the production of the trust instrument or any information concerning that instrument or any ad valorem stamp duty thereon, and whether or not he has notice of its contents he shall, save as hereinafter provided, be bound and entitled if the last or only principal vesting instrument contains the statements and particulars required by this Act to assume that (*a*) the person in whom the land is by the said instrument vested or

declared to be vested is the lifetenant or statutory owner and has all the powers of a lifetenant under this Act, including such additional or larger powers, if any, as are therein mentioned.

Under s. 29 it seems to me plain that the provisions of s. 110 are not applicable to the present case, because the latter part of s. 29, sub-s. 1, expressly states that any conveyance of land held on charitable trusts shall state that the land is held on such trusts, and, where a purchaser has notice that the land is held on charitable trusts, he shall be bound to see that any consents or orders requisite for authorizing the transaction have been obtained.

The vendor's answer to this argument is comparatively short. In the first place, the purchase money of Blackacre is clearly revenue, available for the general purposes of the vendor's trust Scheme, and is exempt from interference by the Charity Commissioners or the Board of Education: see *In re Clergy Orphan Corporation*. (1) Taking the Act generally, there is clearly nothing to convert revenue into capital, and there appears to be no scheme of the Act designed to interfere with the right of an old established charity like this to dispose of its revenue in and for the purposes of its trusts as it may think fit. Unless there is some express provision in the statute it is hopeless to suppose that it can have intended to upset the scheme of management of an old charity like the Salvation Army, known to be governed by one man and intended by its supporters from time to time to be so governed, and to convert its revenue, or any part of it, into capital moneys, and so hamper the carrying out of the trust.

Sect. 29, which is really the main section relied upon by the purchasers, says that "for the purposes of this section" all land vested or to be vested in trustees on or for charitable purposes shall be deemed to be settled land. What that exactly means I have been unable to discover. But whatever it means, it cannot mean that Blackacre is to be deemed to be settled land for the purposes of the Act generally or for

(1) [1894] 3 Ch. 145, 154, 155.

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the purposes of any other section in the Act, but is only to be so deemed for the purposes of s. 29. Then s. 29 says that the land being deemed to be settled land, the trustees shall, without constituting them statutory owners, have in reference to the land, all the powers conferred by the Act on a lifetenant and on the trustees of a settlement. That may be useful in other cases, but if, as in the present case, the trust deed under which the land is held contains all the powers that the trustees of the land and the Director of the trust desire, the giving to such trustees of all the powers of a lifetenant would appear, in the present case, to be of little importance. I have not yet discovered why the section gives the trustees those powers without constituting them statutory owners, but it is not necessary to appreciate the reason in order to decide the present case. It may be that the words "for the purposes of this section" in s. 29 refer not only to giving the trustees these lifetenant powers, but also to the other provisions contained in the various sub-sections. But, whether that be so or not, this land is only made settled land for the purposes of s. 29. The purchasers in order to succeed must show that this land has become settled land and liable as such to the provisions of a number of other sections in the Act. The express words of s. 29 prevent them from establishing that point.

Sects. 108 and 109 deal with powers given by a settlement as distinct from powers given by the Act. In other words, s. 108 does not deal with the exercise of powers given by s. 29 at all. Sub-s. 1 is only a saving clause, and sub-s. 2 merely concentrates the exercise of powers in the case of a lifetenant.

Sect. 109 also has no bearing on s. 29. It has nothing to do with the statutory powers, and, qua the additional powers therein referred to, the Deed Poll is not a settlement for any of the purposes of the Act, except for the purposes of s. 29.

With regard to the purchasers' point as to capital money. If there is capital money arising under the Act, then, of course, ss. 94 and 95 apply. But there is nothing in the statute to make the purchase money capital money at all, in addition

to which it is not money that arises under this Act within the meaning of s. 94 or the interpretation section.

This being so, the purchasers' objections not being made out, the vendor has shown a good title, and is entitled to give a good receipt for the purchase money.

ASTBURY J.
1927
BOOTH AND SOUTHEND-ON-SEA ESTATES COMPANY'S CONTRACT, *In re.*

Solicitors: *Dennes, Lamb & Drysdale; Ranger, Burton & Frost.*

G. R. A.

PRORACE, LIMITED *v.* LE BRASSEUR SURGICAL MANUFACTURING COMPANY, LIMITED.

RUSSELL J.
1927
Feb. 10, 11.

[1925. P. 2644.]

Trade Mark—Certification—Registration—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 3, 62—*Trade Marks Act*, 1919 (9 & 10 *Geo.* 5, *c.* 79), *s.* 12, *Sch. II.*

Registration of a trade mark in respect of the certification of goods is not valid unless the provisions of s. 62 of the Trade Marks Act, 1905, as amended by the Trade Marks Act, 1919, have been complied with. Sect. 3 of the Act of 1905 does not confer any independent right.

WITNESS ACTION.

On December 11, 1923, Prorace, Ld., of 60, Queen's Road, Dalston, manufacturers of anatomical and medical appliances, were registered as proprietors of the trade mark "Prorace," No. 424701 in class 11, in respect of certain articles. On February 7, 1924, Prorace, Ld., entered into an agreement with Lamberts (Dalston), Ld., carrying on business at the same address as the plaintiffs, under which the former agreed to allow the latter to conduct all business connected with the trade mark "Prorace" upon payment of a royalty of sixpence for each article sold bearing the trade mark "Prorace," and Prorace, Ld., undertook to certify each article. The plaintiffs did not obtain the permission of the Board of Trade to register "Prorace" as a trade mark in respect of such goods.

RUSSELL J.
1927
PRORACE, LD. v. LE BRASSEUR SURGICAL MANUFACTURING CO.

This action was brought by the plaintiffs to restrain the defendants from infringing the trade mark. There was also a motion by the defendants in the action to rectify the register by striking out the mark.

Moritz K.C. and *K. E. Shelley* for the plaintiffs. The plaintiffs claim that this mark is used to indicate that the goods are theirs "by virtue of certification." The mark therefore comes within the definition of a trade mark in s. 3 of the Trade Marks Act, 1905. That section is a recognition for the first time of the fact that goodwill may be possessed quite apart from manufacturing and selling.

It is submitted that s. 3 deals with all the ways in which goodwill may be obtained, and certification is one way. Although the plaintiffs have given to another company the right to sell the goods, the property in the trade name is still vested in the plaintiffs: *Warwick Tyre Co.* v. *New Motor and General Rubber Co.* (1) It is admitted that you can have a valid trade mark within s. 3 if the mark is used upon or in connection with the goods to indicate they are the goods of the proprietor of the trade mark by virtue of manufacture, selection, dealing with, or offering for sale. It is submitted that on the plain language of the section a mark used on or in connection with the goods to indicate that they are the goods of the proprietor of the trade mark "by virtue of certification" stands on the same footing. It follows that it is not necessary to comply with the provisions of s. 62 in order to become the proprietors of a trade mark "by virtue of certification."

Courtney Terrell for the defendants. Before the Trade Marks Act, 1905, a trade mark could not be registered in respect of the certification of goods. That right was introduced by s. 62 of the Act, which requires certain conditions to be complied with. The reference to certification in s. 3 is a reference only to the certification trade mark obtainable by complying with the conditions of s. 62. If s. 3 entitled a person to be registered as the owner of a trade mark

(1) [1910] 1 Ch. 248; 27 R. P. C. 161.

"by virtue of certification," then s. 62 would never be resorted to.

RUSSELL J. The plaintiffs claim that this trade mark is used on the goods to indicate that they are the goods of the plaintiffs "by virtue of certification." Before the Trade Marks Act of 1905 there was no statutory definition of a trade mark; it depended upon case law; you had to go to the cases and the text-books to find it out. The Act of 1905 does contain a statutory definition of a trade mark, but before that Act no case had established a right to a trade mark as indicative of the trade mark owner's connection with the goods merely by virtue of certification. Sect. 3 of the Act of 1905 in defining a trade mark used this language: "A 'trade mark' shall mean a mark used or proposed to be used upon or in connexion with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection, certification, dealing with, or offering for sale." The plaintiffs say that section creates a new right and entitles a person, apart from anything else in the Act, to be registered as the owner of a trade mark which will be indicative of the trade mark owner's connection with the goods by virtue of certification. The Act also contains a later section, s. 62, which, as amended by the Trade Marks Act, 1919, is in these terms: "Where any association or person undertakes to certify the origin, material, mode of manufacture, quality, accuracy or other characteristic of any goods by mark used upon or in connection with such goods, the Board of Trade, if and so long as they are satisfied that such association or person is competent to certify as aforesaid, may, if they shall judge it to be to the public advantage, permit such association or person to register such mark as a trade mark in respect of such goods, whether or not such association or person be a trading association or trader or possessed of a goodwill in connection with such certifying. When so registered such trade mark shall be deemed in all respects to be a registered trade mark, and such association or person to be the

RUSSELL J. 1927 PRORACE, LD. v. LE BRASSEUR SURGICAL MANUFACTURING CO.

proprietor thereof, save that such trade mark shall be transmissible or assignable only by permission of the Board of Trade." That section undoubtedly introduces a new right to be acquired, be it observed, only by adopting and following the special procedure indicated in the section. The plaintiffs in this case have not proceeded in any way under that section. The point in dispute between the parties in this case is that the plaintiffs say that s. 3 is independent of s. 62, and confers upon them a right quite apart from the right conferred by s. 62, while the defendants say that the reference in s. 3 to certification is only a reference to the certification trade mark introduced for the first time by s. 62. Those are the two rival views which have been pressed before me. Now, does s. 3 confer a right to a certification trade mark independently of the right referred to in s. 62, or is the word "certification" merely introduced to meet the case provided for by s. 62? The matter has been carefully argued before me, and I am of opinion that the latter is the correct view. There has been no satisfactory answer given to the point put by Mr. Courtney Terrell—namely, that if the plaintiffs' view was correct, that s. 3 conferred a right separate and independent from the right conferred by s. 62, s. 62 would really be an unnecessary section and one which need never be resorted to. That point appears to me to be conclusive, and I accordingly decide that the plaintiffs are wrong in their contention.

The result, therefore, is that the plaintiffs fail in the action and the defendants succeed on the motion for rectification. Accordingly I dismiss the plaintiffs' action with costs, and I make the usual order to rectify and for the plaintiffs to pay the costs of that.

Solicitors: *Strellett, Mercer & Co.; C. W. Letts, for Philip Baker & Co., Birmingham.*

J. B. B. M.

ROMER J.
1927
Jan. 6, 27

In re QUINTIN DICK.

LORD CLONCURRY *v.* FENTON.

[1924. D. 760.]

Practice—Court Fees—Inquiry to ascertain Persons interested in Property—Schedule in the Supreme Court Fees Order, 1924, *Fee No.* 52.

Fee No. 52 in the Schedule to the Supreme Court Fees Order, 1924, is payable "On an inquiry to ascertain the person or persons interested in any property."

The Court directed an inquiry whether any member of class A and class B was living. The Master by his certificate found that W. H. B. was a member of class B, and the certificate also stated that the payment of fee No. 52, if payable, had been postponed under paras. 1 and 2 of s. ii. of the Schedule to the Order, and that the question whether, having regard to the circumstances of the case, such fee was payable, was reserved. The Court thereupon held that W. H. B. was entitled to the property in question:—

Held, that W. H. B. was liable to pay fee No. 52.

THIS summons, reported (1), was restored on a point arising on fee No. 52 in the Schedule to the Supreme Court Fees Order, 1924. The order, dated October 15, 1924, directed inquiries to the effect mentioned in the report. The Master answered the inquiries by his certificate dated November 16, 1925, to the effect mentioned in the report, and the certificate also stated that the payment of the fee No. 52, if payable, had been postponed under paras. 1 and 2 of s. ii. of the Schedule to the Order, and that the question whether, having regard to the circumstances of this case, such fee was payable was reserved. The Court having held as appears in the report (1), the question arose whether the fee attached.

Manning K.C. and *J. V. Nesbitt* for the trustees.

Sir Thomas Hughes K.C. and *Andrewes-Uthwatt* for the defendant, W. H. Barrett. The Master's certificate did not find that the defendant was entitled to the property in question. The document to be stamped with the fee is the certificate, and that must certify the person interested in any property. "Interested" meant persons entitled to

(1) [1926] Ch. 992.

ROMER J. 1927 QUINTIN DICK, *In re.* LORD CLONCURRY *v.* FENTON.

have the money paid to them. This fee should not be levied on any one until the title to the property is established by the certificate. The certificate in this case did not by any means establish the persons interested.

Dighton Pollock for the Official Solicitor. The inquiries that were made in pursuance of the order of October 15, 1924, were essential for the purpose of ascertaining who was entitled to the property. That was sufficient to make the fee payable. The Court could not deal with the matter without an inquiry. The word "interested" was a very wide word.

ROMER J. The question in this case is whether fee No. 52 is or is not payable in respect of the inquiries directed by the order of October 15, 1924. There are inquiries well known to all of us that in terms direct the Master to ascertain who are the persons interested in particular property. One such inquiry is the common inquiry as to persons interested, which used to be directed in partition actions. Another one is the common inquiry to ascertain the persons entitled to the personal estate of some deceased person who has died intestate. In those cases, of course, without any question, the fee is payable. There are other cases in which the inquiry does not in terms refer to the persons interested in any property. Such an inquiry would arise in these circumstances: suppose that a testator has made his will in such a way that it is doubtful whether certain property has or has not been given to a certain class, and it is not known with certainty who constitute that class. In such a case the Court very often, in order to save expense, will appoint some one to represent the class for the purpose of deciding the question of construction. Having decided the question of construction in favour of the class, the Court will then direct an inquiry. The inquiry will not in terms direct the Master to ascertain who are the persons interested in the property, but who are the members of the class. That in my opinion would be in the words of the Schedule—"an inquiry to ascertain the person or persons interested in any

property." But the Court may think it more convenient in such a case to direct an inquiry as to who are the members of the class before deciding the question of construction. In such a case as that, if, after hearing the question of construction argued, the Court comes to the conclusion that the class is entitled, then again the inquiry would in my judgment be an inquiry to ascertain the person or persons interested in the property. For the inquiry is really directed for the purpose of ascertaining the persons who are interested in the property, assuming that a certain event takes place—namely, that the Court decides the question of construction in favour of the class. The event having taken place the inquiry may properly be regarded as an inquiry to ascertain the persons interested in the property. What would happen if, after hearing the question of construction argued, the Court came to the conclusion that the class was not entitled, I need not, on the present occasion, decide. It might be argued in such a case as that, that in the event that happened the inquiry was an inquiry to ascertain what persons were not interested in the property. I express no opinion about that, because this case appears to me to be an intermediate one. The present case is really this: the testator has disposed of his property in such a way that class A or class B may be entitled. In a case like that the Court may, if it thinks fit, appoint people to represent the two classes and decide the question of construction, and then direct an inquiry as to the persons forming the class in whose favour the Court has decided the question of construction. Such an inquiry would be an inquiry to ascertain the persons interested in the property. But supposing in such a case—and that, I think, is the present case—that before deciding the question of construction, the Court directs inquiries as to class A and class B, and when those inquiries are answered, the Court then decides the question of construction in favour of one class or the other, the inquiries would in the event that happened include an inquiry to ascertain the persons interested, although it might be said that there was included in the inquiries an inquiry as to persons not interested.

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In the present case difficult questions of construction arose, and the Court, before deciding the question of construction, directed an elaborate inquiry to find out what person or persons would be interested in the property, according to whether the Court decided in favour of one construction or the other. Those are the inquiries directed by the order in question. It now turns out that one of the persons ascertained by means of one of those inquiries is entitled to this property. In my opinion that inquiry was an inquiry to ascertain the persons interested, although the order also directed inquiries as to persons who, as it turns out, were not interested in the property at all.

Solicitors: *Arnold & Henry White; the Official Solicitor.*

P. J. B.

TOMLIN J.
1927
Feb. 24.

In re TROLLOPE'S WILL TRUSTS.

PUBLIC TRUSTEE *v.* TROLLOPE.

[1926. T. 1700.]

Will—Trust for Sale and Conversion—Power to postpone—Retention of unauthorized Investments under Power to postpone—Tenant for Life—Remainderman—Rule in Howe v. *Lord Dartmouth—Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *s.* 28, *sub-s.* 2—*Administration of Estates Act*, 1925 (15 *Geo.* 5, *c.* 23), *ss.* 33, 39.

The expression "personal representatives" in the Administration of Estates Act, s. 39, does not include trustees in the ordinary sense even when the personal representatives themselves become trustees upon an assent. The introductory words of s. 39 conferring powers on personal representatives "during a minority of any beneficiary or the subsistence of any life interest, or until the period of distribution arrives" are explained by the fact that under the new law of intestate succession the existence of an infant beneficiary or of a beneficiary, such as a widow, entitled to a life interest only may postpone distribution, and that in these cases s. 33 places the personal representatives substantially in the position of trustees.

The provision in s. 39, sub-s. 1 (ii.), conferring on personal representatives "all the powers, discretions and duties conferred or imposed

by law on trustees holding land upon an effectual trust for sale" does not operate referentially to make the Law of Property Act, 1925, s. 28, sub-s. 2, applicable to pure personalty.

Accordingly, where under the will of a testator unauthorized investments are retained under a power to postpone conversion, the rule laid down in *Howe* v. *Lord Dartmouth* (1802) 7 Ves. 137a still remains applicable in regard to the income payable to a tenant for life.

ADJOURNED SUMMONS.

By her will dated June 24, 1924, Mabel Frances Trollope, after appointing her sister Blanche Trollope her niece Kathleen May Henderson and the Public Trustee to be her executors and trustees and making certain specific and pecuniary bequests, devised and bequeathed all her real and personal estate not thereby otherwise disposed of to her trustees upon trust for sale and conversion and to invest the residue of the money produced by such sale and conversion after payment of funeral and testamentary expenses and debts and legacies as therein mentioned. And the testatrix directed her trustees to stand possessed of the said residue and the investments for the time being representing the same In trust to pay the income thereof to her said sister Blanche Trollope during her life and after her death to hold both the capital and income upon the trusts therein mentioned.

The testatrix also declared (clause 8) that all money liable to be invested under her will might be invested in any stocks funds or securities authorized by law for trust funds or in the purchase of inscribed stock of any British colony or on mortgage of any leasehold houses or land in England or Wales held for any term having sixty years still to run. By clause 9 the testatrix empowered her trustees to postpone during such period as they should think fit the sale, calling in and conversion of the whole or any part or parts of her real or personal estate, with a provision that notwithstanding any postponement of conversion of her real estate the same was for the purpose of transmission to be considered as converted from the time of her death.

The testatrix died on December 31, 1925, and her will was proved by all the named executors on March 6, 1926.

TOMLIN J. 1927 TROLLOPE'S WILL TRUSTS, *In re.* PUBLIC TRUSTEE *v.* TROLLOPE.

At her death the testatrix possessed a number of investments which were not authorized. The trustees were proposing to postpone for the present the sale of some of these unauthorized investments, and this summons raised the question whether by virtue of the Law of Property Act, 1925, and the Administration of Estates Act, 1925, s. 39, sub-s. 1 (ii.), or otherwise the whole income of the unauthorized investments was payable to the tenant for life or whether she was only entitled pending their conversion to interest on their capital value at the rate of 4 per cent. per annum.

Sir A. Underhill for the Public Trustee.

Buckmaster for the tenant for life. By the Administration of Estates Act, 1925, s. 39, sub-s. 1 (ii.), "all the powers, discretions and duties conferred or imposed by law on trustees holding land upon an effectual trust for sale" are conferred on personal representatives in dealing with the real and personal estate of the deceased. Under the word "duties" the duty is imposed on them referentially corresponding to that imposed on trustees holding land upon trust for sale by the Law of Property Act, 1925, s. 28, sub-s. 2. It has already been decided in *In re Brooker* (1) that s. 28, sub-s. 2, abolishes the rule in *Howe* v. *Lord Dartmouth* (2) so far as regards leaseholds held upon trust for sale. The effect of s. 39, sub-s. 1 (ii.), is to abolish the rule also in regard to pure personalty so that the whole income of unauthorized investments retained under the power to postpone conversion will be payable to the tenant for life as if a sale had been made and the proceeds duly invested.

It may be argued against this contention that if s. 39 has this effect, s. 33, sub-s. 5, was unnecessary. In the present case s. 33 is inapplicable, because the testatrix died before January 1, 1926. Further it seems doubtful whether the section could be construed as applicable except in the case of an intestacy: see, however, s. 33, sub-s. 7. Probably the correct view is that s. 33 deals only with a complete or

(1) [1926] W. N. 93. (2) 7 Ves. 137a.

partial intestacy. However that may be, s. 39, sub-s. 1 (ii.), is directly in point here, and s. 39 applies whether the testator or intestate died before or after the commencement of the Act: s. 39, sub-s. 3. Further, s. 33, sub-s. 5, is only permissive, while the Law of Property Act, 1925, s. 28, sub-s. 2, is directory.

Rawlence for persons entitled in remainder. This is an application in the trusts of the testatrix's will, and the Court is therefore being asked to decide in regard to the trustees' duties and not those of the personal representatives. Sect. 39 does not relate to trustees at all. The words "personal representatives" are used, and "personal representative" as defined in s. 55, sub-s. 1 (xi.), does not include a trustee. It will be said that in s. 39 "personal representatives" must include "trustees," because it contemplates dealing with the deceased's real and personal estate not only "for purposes of administration" but also "during a minority of any beneficiary or the subsistence of any life interest or until the period of distribution arrives."

These introductory words of s. 39 are, however, explained by the fact that under the new law of intestate succession a widow may take for life. To meet that s. 33 gives the personal representatives of an intestate certain powers as if they were trustees. Thus s. 33, sub-s. 3, uses the same words and provides that "During the minority of any beneficiary or the subsistence of any life interest and pending the distribution of the whole or any part of the estate of the deceased" the personal representatives are to have powers of investment. For these purposes the personal representatives of an intestate are made statutory trustees. It is to this alone that s. 39 refers.

Again, s. 39 confers powers of management only, as is shown by the side-note. It does not interfere with beneficial interests, and the Law of Property Act, 1925, s. 28, sub-s. 2, is not therefore made applicable even in the case of personal representatives. Sect. 33, sub-s. 5, of the Administration of Estates Act, 1925, applies in their case and gives them a discretion to disregard the rule laid down in *Howe* v.

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Lord Dartmouth. (1) Reliance is placed on the word "duties" in s. 39, sub-s. 1 (ii.), but it is a startling idea that it should be the duty of either personal representatives or trustees to interfere with the rules of equity as between tenant for life and remainderman.

Harcourt Harding for another remainderman. (2)

TOMLIN J. In this case the testatrix died on December 31, 1925, having by her will given her residuary real and personal estate to trustees upon trust for sale and conversion and to hold the net residuary estate and the investments thereof in trust to pay the income thereof to her sister during her life with trusts over. And the testatrix declared that all money liable to be invested under the will might be invested "in any stocks funds or securities authorised by law for trust funds or in the purchase of inscribed stock of any British Colony or on mortgage of any leasehold houses or land in England or Wales held for any term having 60 years to run at the time of investment." Then follows this proviso: "Provided always and I empower my trustees in their uncontrolled discretion to postpone during such period as they shall think fit the sale calling in and conversion of the whole or any part or parts of my estate real or personal but notwithstanding any such postponement of conversion of my real estate the same shall for the purposes of transmission be considered as converted from the time of my death."

The estate of the testatrix included a number of investments not authorized by the will the sale of which has been postponed by the trustees. The question which arises is whether the tenant for life is entitled to the income of these unauthorized investments until they are sold or whether the income should be applied in accordance with the rule in *Howe* v. *Lord Dartmouth* (1), it being suggested that the rule has been abolished by recent legislation.

It is plain that there is nothing in the will to give

(1) 7 Ves. 137a.

(2) It was intimated that all parties desired that the decision of the Court should extend to the period before an assent as well as afterwards.

the tenant for life a right to the whole income on these investments; and unless there is a statutory abolition of the rule it must apply in this case.

The question is whether under the recent property statutes a change has been effected by the law in this respect. The material statutes are the Law of Property Act, 1925, and the Administration of Estates Act, 1925. The Law of Property Act, 1925, s. 28, sub-s. 2, contains a provision relating to trustees for sale of land in these terms: "Subject to any direction to the contrary in the disposition on trust for sale or in the settlement of the proceeds of sale, the net rents and profits of the land until sale, after keeping down costs of repairs and insurance and other outgoings shall be paid or applied, except so far as any part thereof may be liable to be set aside as capital money under the Settled Land Act, 1925, in like manner as the income of investments representing the purchase money would be payable or applicable if a sale had been made and proceeds had been duly invested."

The effect of that sub-section is that in regard to the property which is the subject-matter of the section, the rule in *Howe* v. *Lord Dartmouth* (1) no longer applies, because, subject to provision being made for outgoings, the income is to be applied as if it were income of proper investments of the proceeds of sale. Lawrence J. in *In re Brooker* (2) in fact held with regard to leaseholds which are included in the definition of "land" in the Law of Property Act, 1925, s. 205, sub-s. 1 (ix.), that "the principle laid down in *Howe* v. *Lord Dartmouth* (1) hitherto applied by Courts of equity during the period of the postponement of the sale of leaseholds held on trust for sale, was no longer applicable to a case like the present."

Therefore, so far as leaseholds held in trust for sale are concerned, the rule of *Howe* v. *Lord Dartmouth* (1) is gone. The question I have to decide is whether the Administration of Estates Act, 1925, has done the same for property other than "land" within the Law of Property Act, 1925, s. 28,

(1) 7 Ves. 137a. (2) [1926] W. N. 93.

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sub-s. 2, by referential legislation which brings into operation under the former Act the rule applicable to land under the Law of Property Act, 1925.

The relevant section is s. 39, which so far as material is in these terms: "(1.) In dealing with the real and personal estate of the deceased his personal representatives shall, for purposes of administration, or during a minority of any beneficiary or the subsistence of any life interest, or until the period of distribution arrives, have— . . . . (ii.) all the powers, discretions and duties conferred or imposed by law on trustees holding land upon an effectual trust for sale (including power to overreach equitable interests and powers as if the same affected the proceeds of sale). . . . ." Sub-s. 3 provides that "this section applies whether the testator or intestate died before or after the commencement of this Act"; and the section is therefore applicable to the estate of the testator. It is said that sub-s. 1 (ii.) has the effect of importing in relation to property other than land the provisions of the Law of Property Act, 1925, relating to land held upon trust for sale, including the provision that the income of the land until sale was to be applied as if it was income arising from investments of the proceeds of sale. In other words, it is contended that the tenant for life is entitled to receive the whole of the income arising from the retained investments, and that the rule laid down in *Howe* v. *Lord Dartmouth* (1) is excluded.

The first thing that strikes the eye in regard to s. 39 is that, as indicated by the side-note, it is a section giving powers of management. But to whom are these powers given? To the personal representatives. At the outset, then, I need to know what is meant by the expression "personal representative" and for that purpose I must refer to s. 55, sub-s. 1 (xi.): "'Personal representative' means the executor, original or by representation, or administrator for the time being of a deceased person, and as regards any liability for the payment of death duties includes any person who takes possession of or intermeddles with the property of a deceased

(1) 7 Ves. 137a.

person without the authority of the personal representatives or the Court. . . . ."

It is therefore plain that the expression "personal representative" does not include trustees in the ordinary sense and that nobody could suggest that, if a testator appointed A. to be his executor and gave his residue to B. upon certain trusts, s. 39 could have any application to the property in B.'s hands. In that case the rule in *Howe* v. *Lord Dartmouth* (1) would clearly continue to apply, the statutory exclusion, if any, being confined to the period during which the property was in the hands of the personal representative. But it is said that "personal representatives" must have a wider meaning in s. 39, because it contemplates their dealing with the deceased's property "during a minority of any beneficiary or the subsistence of any life interest, or until the period of distribution arrives"; and it is said therefore that the section contemplates that when the personal representatives become trustees the provisions of the section are to continue to apply.

The explanation of those further words is, however, to be found in the fact that under these elaborate and complicated Acts the law of intestacy is changed and that on an intestacy there may be some one whose interest is for life only, as for instance the widow of the intestate, and that under s. 33 of the Administration of Estates Act, 1925, powers resembling those of trustees are conferred on personal representatives. Sub-s. 1 of that section provides that "on the death of a person intestate, as to any real or personal estate, such estate shall be held by his personal representatives—(*a*) as to the real estate upon trust to sell the same; and (*b*) as to the personal estate upon trust to call in sell and convert into money such part thereof as may not consist of money, with power to postpone such sale and conversion for such a period as the personal representatives, without being liable to account, may think proper. . . . ." Sub-s. 2 provides for payment of debts and funeral and testamentary expenses, and then sub-s. 3 provides that "During the

(1) 7 Ves. 137a.

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minority of any beneficiary"—which seems to contemplate one of the persons entitled on an intestacy being an infant—"or the subsistence of any life interest"—which seems to have regard to a person only taking a life interest under an intestacy—"and pending the distribution of the whole or any part of the estate of the deceased, the personal representatives may invest the residue of the said money, or so much thereof as may not have been distributed, in any investments for the time being authorised by statute for the investment of trust money, with power, at the discretion of the personal representatives, to change such investments for others of a like nature." Sub-s. 5 is as follows: "The income (including net rents and profits of real estate and chattels real after payment of rates, taxes, rent, costs of insurance, repairs and other outgoings properly attributable to income) of so much of the real and personal estate of the deceased as may not be disposed of by his will, if any, or may not be required for the administration purposes aforesaid, may however such estate is invested, as from the death of the deceased, be treated and applied as income, and for that purpose any necessary apportionment may be made between tenant for life and remainderman." And sub-s. 7 provides: "Where the deceased leaves a will, this section has effect subject to the provisions contained in the will."

I think sub-s. 7 must mean that this section applies only so far as the estate is not disposed of by a will; but it seems clear that the effect of that section is for certain purposes in connection with intestacy to constitute the personal representative a trustee with certain powers, including in cases where no immediate distribution is possible a power to distribute the income as if the rule in *Howe* v. *Lord Dartmouth* (1) did not exist.

These provisions provide a complete explanation of the early part of s. 39, sub-s. 1. The sub-section is dealing, first, with personal representatives in their ordinary capacity when it refers to their dealing with the deceased's property "for purposes of administration." Then it deals with their

(1) 7 Ves. 137a.

position during the postponement of distribution, when they are placed in the position of trustees, that is, when the personal representatives are unable to distribute by reason of the infancy of any beneficiary or "the subsistence of any life interest," as in the case of an intestate leaving a widow, "or until the period of distribution arrives," words sufficiently wide to apply to any other case in which distribution is delayed.

As soon as the personal representatives have administered the estate of a testator and assented, the period of distribution has arrived for the purposes of this section; and the section has no application to a case where the residue of the personal estate other than leaseholds is held by the trustees (even though they are the same persons as the personal representatives) upon trust for sale with power to postpone conversion and there is a tenant for life. The application of s. 39 is exclusively confined to the duties of the personal representatives, either in the ordinary course of administration or as conferred on him by statute under s. 33 or otherwise in relation to estates undisposed of by will.

There remains the question whether during the period before the personal representatives have assented the rule in *Howe* v. *Lord Dartmouth* (1) is excluded by virtue of s. 39, sub-s. 1 (ii.), and the Law of Property Act, 1925, s. 28, sub-s. 2. In my view the word "duties" in s. 39, sub-s. 1 (ii.), means "duties" in a strict sense, and the provision that the personal representatives are to have "all the . . . . duties conferred or imposed on trustees holding land upon an effectual trust for sale" does not mean that there are thereby imported statutory trusts applying to a different subject-matter.

I therefore hold that the rule laid down in *Howe* v. *Lord Dartmouth* (1) is applicable in regard to retained unauthorized investments whether in or after the executor's year.

Solicitors: *Charles Rogers, Sons & Abbott; Beckingsales & Naylors.*

(1) 7 Ves. 137a.

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Bankruptcy—Contract of Sale—C.i.f.—One moiety of defined Goods about to be shipped—"Specific or ascertained goods"—Payment of purchase Money—Subsequent Bankruptcy of Vendor—No Appropriation of Moiety—Specific Performance—Equitable Assignment—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *ss.* 52, 62.

By a c.i.f. contract of November 20, 1925, Wait bought 1000 tons of a special wheat ex *Challenger*, expected to load in December at Oregon.

By a c.i.f. contract of November 21 Wait sold 500 tons of this parcel to sub-purchasers.

The wheat was shipped in bulk at Oregon on December 21, and a bill of lading for the 1000 tons forwarded to Wait, who received it on January 4, 1926. The purchase money was due on February 6—i.e., thirty-three days after sight—and on February 5, although the sub-purchasers had never received any bill of lading, warrant, delivery order or any document of title representing the goods, and the 500 tons were never appropriated, they gave Wait their cheque for their 500 tons less the half freight payable at destination.

Wait having paid this cheque to his bank and hypothecated the 1000 tons bill of lading became a bankrupt before the ship arrived.

The trustee having redeemed this bill of lading claimed to retain the entire 1000 tons, leaving the sub-purchasers their remedy in damages :—

Held, by the Court of Appeal (Lord Hanworth M.R. and Atkin L.J. Sargant L.J. dissenting) :—

(1.) That the 500 tons were not specific or ascertained goods in respect of which specific performance of the contract of sale would be ordered as the remedy of the sub-purchasers under s. 52 of the Sale of Goods Act, 1893 ; and

(2.) That there never was any such appropriation or identification of, or any such obligation to deliver, a particular 500 tons, as to effect an equitable assignment giving the sub-purchasers a beneficial interest therein or a lien in respect thereof.

Per Atkin L.J. : "Ascertained goods" in s. 52 of the Act mean goods identified in accordance with the agreement after the time a contract of sale is made.

Holroyd v. *Marshall* (1861) 10 H. L. C. 191, 209 ; *Hoare* v. *Dresser* (1859) 7 H. L. C. 290, 311, 317, 318 ; *Howell* v. *Coupland* (1874) L. R. 9 Q. B. 462 ; (1876) 1 Q. B. D. 258 explained and distinguished.

Thames Sack and Bag Co. v. *Knowles & Co.* [1918] W. N. 176 ; 88 L. J. (K. B.) 585 ; *Hayman & Son* v. *M'Lintock* 1907 S. C. 936 ; 44 S. L. R. 691 and *Laurie* v. *Dudin & Sons* [1926] 1 K. B. 223 applied.

Decision of the Divisional Court (Astbury and Lawrence JJ.) [1926] Ch. 962 reversed.

Per Sargant L.J. dissenting : The agreement for sale to the sub-purchasers was an agreement for the sale of specific goods amounting to

an equitable assignment enforceable against the particular parcel of goods in the trustee's hands, and the sub-purchasers, as purchasers of those specific 500 tons, having paid the whole of the purchase money (less 750*l.*, the half freight), were entitled to have the 500 tons made over to them on payment of the balance of 750*l.*

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APPEAL from the Divisional Court in Bankruptcy (1) in the following circumstances :—

By a c.i.f. contract of November 20, 1925, Wait (trading as Wait & James, Bristol) bought from Balfour Williamson & Co., London, 1000 tons of Western White wheat ex motor vessel *Challenger*, expected to load between December 16 and 31, 1925, from Oregon or Washington. The price was 57*s.* per 480 lbs.

By a c.i.f. contract of November 21, 1925, Wait sold 500 tons of this parcel by the same description and at the same price to Humphries & Bobbett, Bristol (hereinafter called "the sub-purchasers"), adding: "The wheat sold is part of a parcel bought from Balfour Williamson & Co. under contract dated November 20, and in the event of their not duly fulfilling same, it is understood that Messrs. Wait & James are not to be held liable to buyers."

The wheat was shipped in bulk on the *Challenger* by Balfour Williamson & Co.'s agent at Oregon on December 21, 1925, and a bill of lading of that date for the 1000 tons was issued. The freight was 1500*l.* This bill of lading was received by Wait on January 4, 1926, and the purchase price was payable on February 6—i.e., thirty-three days after sight.

On January 5, 1926, Wait delivered to the sub-purchasers a provisional invoice for their 500 tons, the price of which, less 750*l.* half freight payable at destination, was 5933*l.*, due February 6. On February 2 he delivered a confirmatory invoice, and on February 5 the sub-purchasers gave him a cheque for the 5933*l.*

On February 6 Wait paid this cheque of 5933*l.* with other cheques totalling 12,168*l.* into his bank. At the same time he hypothecated the above bill of lading and two bills of lading relating to two other shipments to the bank to secure his overdraft. He then had only one general account.

(1) [1926] Ch. 962.

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On February 9—i.e., three days later—the bank on its own initiative and without any request from Wait opened three loan accounts relating to the three shipments. Account No. 1, which related to the 1000 tons transaction, commenced with a credit of the 5933*l.* cheque and a debit of 11,797*l.* transferred from the general account, against which debit the 1000 tons bill of lading was held.

On February 17, 1926, Wait gave notice of suspension of payment, and on February 24 he was adjudicated bankrupt on his own petition, and Collins was appointed special manager by the official receiver.

On February 26 the sub-purchasers sent Collins a cheque for 750*l.*, the half freight, but he returned it by the official receiver's instructions.

On February 27, 1926, Collins, as special manager, discharged the 11,797*l.* debit, and received the 1000 tons bill of lading, leaving No. 1 account in credit 5933*l.*

On February 28 the *Challenger* arrived at Avonmouth with the 1000 tons in bulk. The sub-purchasers' 500 tons had never been appropriated.

On March 3 the sub-purchasers issued a notice of motion in the Bristol County Court asking that the trustee (then the official receiver) should specifically perform the contract of November 21, 1925, by delivering 500 tons out of the 1000 tons of wheat on the *Challenger* to the sub-purchasers on payment of the 750*l.* half freight. Alternatively they asked for an order for repayment of the 5933*l.* purchase money or alternatively for a declaration that they had a beneficial interest in the parcel of wheat to the extent of 500 tons, and a charge upon the wheat and the bill of lading for the 5933*l.* purchase money.

On March 5 Collins was appointed trustee. He was subsequently made a respondent. At the date of the motion some of the wheat had been disposed of, but 530 tons were left, the 500 being still unappropriated.

On March 13, 1926, the county court judge held that the 500 tons were not " specific " or " ascertained " goods within the authorities, and he could not order specific performance,

but holding that the 5933*l.* purchase money was in the nature of a trust fund earmarked for a specific purpose, and that in any case it was unconscionable of the trustee, as an officer of the Court, to keep both the goods and the purchase money, he ordered the trustee to repay that amount.

On March 31 the trustee gave notice of appeal, and on April 1 the sub-purchasers gave a cross notice asking for specific performance if it were held that the county court judge's order for repayment could not stand.

The Divisional Court in Bankruptcy (Astbury and Lawrence JJ.) were of opinion that although, for want of appropriation, the property in the 500 tons had not passed to the sub-purchasers, those 500 tons were specific goods within s. 52 of the Sale of Goods Act, 1893, as defined by s. 62, and that the Court had jurisdiction to order specific performance of the contract; and the Court made a declaration that the sub-purchasers were entitled to specific performance on payment of the 750*l.* half freight, which had been tendered and refused.

The trustee in bankruptcy appealed. The appeal was heard on November 15, 16, 17, 18, 19, 1926.

Jowitt K.C. and *Croom-Johnson* for the appellant. The question in this case depends entirely upon the provisions of the Code in the Sale of Goods Act, 1893, and is—is this a case in which there is a contract to deliver specific or ascertained goods of which the Court will grant specific performance under s. 52 of the Act? Unless the goods are specific or ascertained the Court cannot grant specific performance. These 500 tons of wheat were neither specific nor ascertained; but assuming that they were, then we submit that in the exercise of its discretion the Court will not grant specific performance of a contract for the sale of a common article such as wheat, or merely because of the bankruptcy.

Under s. 52 the goods must be specific or ascertained; and by s. 62 "specific goods" are defined to mean goods identified and agreed upon at the time the contract of sale

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is made. That cannot apply to these 500 tons of wheat. There is no definition of "ascertained goods" as used in s. 52 and also in ss. 16 and 17. These were "future goods" within the meaning of s. 5, and were never "unconditionally appropriated" under s. 18, r. 5, so as to make the property in them pass to the sub-purchasers. These 500 tons were never "ascertained goods": *Hayman & Son* v. *M'Lintock* (1); *Thames Sack and Bag Co.* v. *Knowles & Co.* (2); *Laurie* v. *Dudin & Sons.* (3)

The respondents rely upon the statement of Lord Westbury in *Holroyd* v. *Marshall* (4), where he said: "a contract to sell five hundred chests of the particular kind of tea which is now in my warehouse in Gloucester, is a contract relating to specific property, and which would be specifically performed," but in the Law Journal report of the case (5) he is reported to have said: "but a contract to sell the five hundred chests of a particular kind of tea which are," etc., which we submit is a more correct view of the law. The former statement was commented upon in *Tailby* v. *Official Receiver* (6) and in Fry on Specific Performance, 6th ed., p. 38.

In *Hoare* v. *Dresser* (7), also relied upon by the respondents, there had been an appropriation of the whole of the cargo to the contract there in question, and *Wait* v. *Baker* (8) was referred to as showing that at law no property in the cargo would have passed to Dresser. In *Howell* v. *Coupland* (9) there was a much greater particularity than in the present case concerning the goods; there, any 120 tons of potatoes wherever grown would not have satisfied that contract, but here, the 500 tons were to be of any Western White wheat, no matter where grown.

All those cases were decided before the Code. Now s. 52 allows specific performance where the goods are specific or ascertained, and is not limited to cases where the property

(1) 1907 S.C. 936; 44 S. L. R. 691.
(2) [1918] W. N. 176; 88 L. J. (K. B.) 585.
(3) [1926] 1 K. B. 223.
(4) 10 H. L. C. 191, 209.
(5) 33 L. J. (Ch.) 193, 196.
(6) (1888) 13 App. Cas. 523.
(7) 7 H. L. C. 290.
(8) (1848) 2 Ex. 1.
(9) 1 Q. B. D. 258.

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has passed: *James Jones & Sons* v. *Earl of Tankerville* (1); Benjamin on Sales, 6th ed., p. 1121; and the difference between "generic" and "specific" goods is emphasized in Chalmers on Sale of Goods, 10th ed., p. 153. In this case the goods never were "specific" or "ascertained."

Luxmoore K.C. and *Wethered* for the respondent sub-purchasers. This is a contract for specific goods within s. 52 of the Sale of Goods Act, 1893, of which specific performance can be granted at the suit of the purchaser. Before the Act specific performance could only be obtained where the goods had a special value, as in *Pusey* v. *Pusey* (2), but s. 52 has widened that. We are asking for specific performance of the contract of November 21, 1925, for the sale of 500 tons, and only the 1000 tons of Western White wheat bought from Balfour Williamson & Co. ex motor vessel *Challenger* would satisfy that contract, and no other wheat. The wheat bought by the respondents was in existence, and the respondents had a sealed sample. It was clearly identified and comes within the definition of specific goods in s. 62 of the Act. The potatoes in *Howell* v. *Coupland* (3) which were treated as specific, are also "specific goods" within the definition in the Code, as well as "future goods": Benjamin on Sales, 6th ed., p. 165. In s. 7 of the Act, which was inserted to give effect to the decision in *Howell* v. *Coupland* (3), the goods are referred to as "specific goods," i.e., goods "identified and agreed upon." There is no difference in principle between this case and *Howell* v. *Coupland*. (3) We rely upon Lord Westbury's dictum in *Holroyd* v. *Marshall*. (4) Even if it was premature, that has been cured by s. 52 of the Sale of Goods Act, 1893: Fry on Specific Performance, 6th ed., p. 38. In *Tailby* v. *Official Receiver* (5) the House did not quarrel with Lord Westbury's statement of the law. Where there is a contract to appropriate a particular cargo, or a part of a larger cargo, then equity will intervene and decree specific performance in the former case, or declare a lien in the latter case upon the larger cargo to enable the purchaser

(1) [1909] 2 Ch. 440.
(2) (1684) 1 Vern. 273.
(3) 1 Q. B. D. 258.
(4) 10 H. L. C. 191, 209.
(5) 13 App. Cas. 523.

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to satisfy his contract; per Lord Cranworth in *Hoare* v. *Dresser*. (1) In *Howell* v. *Coupland* (2) the contract, although for future goods, was held to be a contract for specific goods.

Hayman & Son v. *M'Lintock* (3) is wholly distinguishable, and involved no question of specific performance. The contract was for any golden flour, and not for specific flour. *Thames Sack and Bag Co.* v. *Knowles & Co.* (4) was a contract for generic goods, and there was no appropriation to it. Again, in *Laurie* v. *Dudin & Sons* (5) there was no question of specific performance and no claim for any specific maize; the question was whether the property had passed. It is not necessary for specific performance that the property should have passed to the purchaser: *James Jones & Sons* v. *Earl of Tankerville* (6); and the same applies even against a trustee in bankruptcy: *Pearce* v. *Bastable's Trustee*. (7) It is no answer to the respondents to say that this is not an action for breach of contract within s. 52, because by s. 61 the rules in bankruptcy relating to contracts of sale are saved. By s. 225 of the Supreme Court of Judicature (Consolidation) Act, 1925, "action" means a civil proceeding commenced by writ or in such other manner as may be prescribed by rules of Court, and r. 26 of the Bankruptcy Rules provides that all applications must be made by motion. An application for a prerogative writ of mandamus is an action within the definition in s. 225: *Rex* v. *Westminster Assessment Committee* (8); and so also is an action in the county court: *Johnson* v. *Refuge Assurance Co.* (9) A motion in bankruptcy is an "action" within s. 52.

Further, there was a good equitable assignment to the respondents. As soon as the respondents had paid their purchase money, Wait became a trustee for them: *Hoare* v. *Dresser* (1); *Holroyd* v. *Marshall* (10); *Tailby* v. *Official*

(1) 7 H. L. C. 290.
(2) 1 Q. B. D. 258.
(3) 1907 S. C. 936; 44 S. L. R. 691.
(4) [1918] W. N. 176; 88 L. J. (K. B.) 585.
(5) [1926] 1 K. B. 223.
(6) [1909] 2 Ch. 440.
(7) [1901] 2 Ch. 122.
(8) [1917] 2 K. B. 215.
(9) [1913] 1 K. B. 259.
(10) 10 H. L. C. 191.

Receiver. (1) Every payment in part performance of a contract transfers to the purchaser in equity a corresponding portion of the property: *Rose* v. *Watson.* (2) Here the equity attached to the 1000 tons and operated to restrain dealing with them except subject to the provision of the 500 tons for the respondents. The purchaser of a portion of a cargo obtains an undivided interest in the whole cargo: *Sterns, Ld.* v. *Vickers, Ld.* (3), which is an insurable interest: *Inglis* v. *Stock.* (4)

We do not contend that any trust for the respondents was created in respect of the 5933*l.* paid by them, or that we can follow the money on the basis of any trust.

Jowitt K.C. in reply. In *Sterns, Ld.* v. *Vickers, Ld.* (3) the plaintiffs had the document of title and it was held that the risk had passed to them. That decision has no bearing on the present question.

The doctrine of equity relative to the assignment of future property only applies to property capable of being identified: *In re Clarke.* (5) At no time was there any identification or specific ascertainment of these 500 tons, to which the doctrines of equitable assignment or specific performance will apply. The Court will refuse to interfere by injunction to restrain the breach of a contract for the sale of goods the performance of which it could not specifically enforce: *Fothergill* v. *Rowland.* (6)

Cur. adv. vult.

Dec. 17. Lord Hanworth M.R. This is an appeal from the Divisional Court sitting in Bankruptcy, which varied an order of the county court judge at Bristol, within whose court the bankruptcy is proceeding.

The facts are fully set out in the report below (7). It is unnecessary to repeat them, except to mark attention to certain matters, more particularly relevant to this judgment.

(1) 13 App. Cas. 523.
(2) (1864) 10 H. L. C. 672.
(3) [1923] 1 K. B. 78.
(4) (1885) 10 App. Cas. 263.
(5) (1887) 36 Ch. D. 348.
(6) (1873) L. R. 17 Eq. 132.
(7) [1926] Ch. 962.

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Wait & James, the firm's name under which the business of the bankrupt Wait was carried on, were corn dealers. On November 20, 1925, they made a c.i.f. contract, as purchasers, with Balfour Williamson & Co., of London, as sellers, for 1000 tons of Western White wheat to arrive at Avonmouth per motor vessel *Challenger*, expected to load between December 16 and 31, 1925, from Oregon and/or Washington. On November 21 Messrs. Humphries & Bobbett made a c.i.f. contract with Wait & James to purchase 500 tons of this Western White wheat to arrive per motor vessel *Challenger*. The wheat was shipped in bulk on the motor vessel *Challenger* by Balfour Williamson & Co.'s agent at Oregon on December 21, 1925, and a bill of lading of that date for the 1000 tons was issued. This bill of lading was received by Wait on January 4, 1926, and the purchase price was payable thirty-three days after sight, that is on February 6; on January 5, 1926, Wait delivered to Messrs. Humphries & Bobbett a provisional invoice for their 500 tons, the price of which, less half freight payable at destination, was 5933*l.*, due on February 6. On February 2 he delivered a confirmatory invoice, and on February 5 the sub-purchasers gave him a cheque for the 5933*l.*, and Wait paid this cheque with others, amounting in all to the total sum of 12,168*l.*, into his bank to his general account, on which he had an overdraft. On February 17 Wait gave notice of suspension of payment, and on February 24 he was adjudicated a bankrupt on his own petition, and Mr. Collins was appointed special manager of the business by the official receiver.

By the result of the transactions with the bank which are detailed in the report referred to, there was on February 27 a credit of 5933*l.* upon the separate account relating to the transaction of the 1000 tons of wheat which had been established some days after the cheque for 5933*l.* had been paid into Wait's general account. On February 28, the motor vessel *Challenger* arrived at Avonmouth with the 1000 tons of wheat in bulk. The sub-purchaser's 500 tons had never been appropriated. On March 5 Collins was appointed trustee.

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By notice of motion dated March 3, Messrs. Humphries & Bobbett applied to the county court judge sitting in bankruptcy for an order: (1.) That the trustee might be ordered to specifically perform the contract of sale of November 21, 1925, by delivering 500 tons of Western White wheat on payment by applicants of their proportion of freight due in respect of it. Or (2.) alternatively that the trustee should repay the above sum of 5933*l.* Or (3.) that a declaration should be made that the applicants had a beneficial interest in the wheat arrived upon the motor vessel *Challenger* to the extent of 500 tons and a charge upon the wheat to secure repayment to them of the said sum of 5933*l.*, and an injunction to the trustee from disposing or otherwise dealing with the wheat until that charge had been satisfied by payment. And (4.) an order for the payment of the 5933*l.* 5*s.* to the applicants.

The county court judge held that Messrs. Humphries & Bobbett were not entitled to specific performance; but that the trustee was not entitled to retain the money and not give delivery of the goods for which payment had been made, and treated the payment as of a trust fund in the hands of the firm who received it. He, therefore, ordered the money to be repaid.

On appeal, the Divisional Court (consisting of Astbury and Lawrence JJ.) discharged the order of the county court judge, except as to costs, and declared that the applicants were entitled to have the contract specifically performed on payment to the trustee in bankruptcy of 750*l.* as the aliquot sum for the freight of the 500 tons of wheat. The trustee appeals to this Court. At the date of the motion, some of the wheat had been disposed of, but 530 tons were left, the 500 tons being still unappropriated to the sub-purchasers. The Divisional Court made the order for specific performance on the ground that the 500 tons of wheat were specific goods within s. 52 of the Sale of Goods Act, 1893, and thus that the Court could direct that the contract should be performed specifically. This was the point mainly relied upon in this Court, for counsel for the respondents to the

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appeal did not contend that there was any trust as to the 5933*l.*, or that he could claim to follow the money on the basis of a trust, expressed or implied. His contention was (*a*) that although the 500 tons were not identified and agreed upon at the time the contract of sale was made so as to satisfy the term "specific goods" as interpreted under s. 62 of the Code, yet they were "ascertained goods" within s. 52, after the wheat had been shipped on board the motor vessel *Challenger*, for they could be, and therefore ought to be, ascertained from out of the wheat bought from Balfour Williamson & Co., at any rate upon arrival at Avonmouth, and (*b*) that on payment of the purchase price there was an equitable assignment of so much of the wheat ex motor vessel *Challenger* as was necessary to satisfy the contract to sell 500 tons on which the payment had been made. The cases mainly relied upon were *Holroyd* v. *Marshall* (1); *Hoare* v. *Dresser* (2); and *Howell* v. *Coupland*. (3)

It is necessary, therefore, to examine the meaning and effect of s. 52 in relation to the facts of the present case. This section reproduces s. 2 of the Mercantile Law Amendment Act, 1856. By s. 78 of the Common Law Procedure Act, 1854, the Common Law Courts were given power to order the return of specific chattels; a power which the Courts of equity had exercised from a very early period, particularly where the chattels were of a peculiar value, as in the case of the horn in *Pusey* v. *Pusey* (4), and the patera in *Duke of Somerset* v. *Cookson* (5), the remedy at law being imperfect. For in the action of trover damages only were recovered, and in detinue the defendant could retain the chattel sued for, upon payment of the value as assessed by the jury, and thus only an ineffective remedy was afforded. By this s. 78, the Courts of Law at Westminster were empowered to enforce specific delivery "on the application of the plaintiff" where the nature of the case called for such a special remedy.

(1) 10 H. L. C. 191.
(2) 7 H. L. C. 290.
(3) L. R. 9 Q. B. 462.
(4) 1 Vern. 273.
(5) (1735) 3 P. Wms. 389.

The Mercantile Law Amendment Act, 1856, by s. 2, conferred similar powers, in respect of a contract to deliver specific goods for a price in money, upon any of the superior Courts of Common Law at Westminster or Dublin or any Court of Record in England, Wales or Ireland on the application of the plaintiff. This section has been replaced by s. 52 of the Sale of Goods Act, 1893, and by s. 60 of that Act, s. 2 of the Mercantile Law Amendment Act was repealed. Sect. 78 of the Common Law Procedure Act was repealed by 46 & 47 Vict. c. 49, s. 3.

But s. 52 remains a section which is to be put in force upon the application of the plaintiff. It provides one of the remedies of the buyer, and it does not give correlative rights to the seller. Its operation remains limited. It is not possible to overlook the original purpose and scope of its predecessors, which was to meet a difficulty and hardship suffered by a buyer in respect of specific goods, and the section reproduces the old law in a codifying statute. It has not changed the law.

The section applies to all cases where the goods are specific or ascertained, whether the property has passed to the buyer or not: see *James Jones & Sons* v. *Earl of Tankerville.* (1) Looking at the history and reason of the matter, I cannot agree with Astbury J. that "if the property passed, specific performance would not be necessary. It is only in cases where the property does not pass, but the contract is for the delivery of specific goods, that specific performance becomes important."

The problem to be solved comes back to the question: were the 500 tons specific goods? They were never appropriated, and it is admitted that the legal property has not passed, for these were future goods within s. 5 of the Code in respect of which no property passed to the purchaser: see ss. 16, 17 and 18, sub-s. 5. There was no ascertainment or identification of the 500 tons out of the cargo in bulk of the motor vessel *Challenger*.

The bankruptcy of the vendor does not in my judgment affect the question, though it may emphasize the hardship to the purchasers, for the question must be determined upon

(1) [1909] 2 Ch. 440, 445.

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the rights of the parties under the contract upon the arrival of the wheat.

The argument for the respondents depends in no small measure upon the validity of the dictum of Lord Westbury in *Holroyd* v. *Marshall* (1) which, if premature at the date of its utterance, is said now to be law by virtue of s. 52 of the Code. It was this passage from Lord Westbury's speech which Astbury J. primarily relied upon. It is not certain what were the words used by Lord Westbury in giving his illustration of the sale of a particular parcel of tea. The Law Journal report (2) runs as follows: "A contract for the sale of goods as, for example, of 500 chests of tea was not a contract which would be specifically performed, because it did not relate to any chests of tea in particular, but a contract to sell *the* 500 chests of a particular kind of tea, which 'are now in my warehouse in Gloucester,' was a contract relating to specific property, and which would be specifically performed." These words appear to indicate clearly specific goods in a specific place, identified and ascertained as the subject-matter of the contract.

Before dealing, however, with *Holroyd* v. *Marshall* (1) I wish to refer to some of the cases to which the notice of the Court was directed. In *Wait* v. *Baker* (3) there was a contract made by the defendant to purchase 400–500 quarters of barley f.o.b. at Kingsbridge. The ship to carry it was chartered, and the charterparty sent to the defendant. The vessel was loaded and the vendor had gone as far as to leave the invoice and the unindorsed bill of lading at the defendant's place of business. A dispute arose. The defendant made, as the jury found, an unconditional tender of the amount of the invoice, but the vendor refused to accept it and took back the bill of lading. It was held that the contract was not for the delivery of specific goods, that no property in them had passed: that there was no appropriation, and no agreement that that specific cargo should become the property of the defendant.

(1) 10 H. L. C. 191, 209, 210. (2) 33 L. J. (Ch.) 193, 196.
(3) 2 Ex. 1.

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In *Hayman & Son* v. *M'Lintock* (1) the question arose whether the trustee in bankruptcy of a purchaser of flour, stored in a warehouse, was entitled to claim the flour in priority to the holders of certain store warrants and delivery orders which had been given to the holders on the sale of aliquot portions of the flour by the bankrupts to them. It was held that the trustee's title prevailed. The Lord President, Lord Dunedin, said that though there was no question as to the contract of sale of the flour lying in the store, yet the bankruptcy intervened before anything was done in the way of separating the bags; and Lord Maclaren added that as the sacks were neither numbered, nor marked, nor put into receptacles, nor ascertained in such a way as to distinguish them from other flour in the warehouse, no effectual right of security was constituted by the delivery order given.

In *Thames Sack and Bag Co.* v. *Knowles & Co.* (2) Sankey J. held in the case of a "spot" contract for the sale of ten bales of Hessian bags, which imported that the goods were actually available and ready for immediate delivery, after an invoice had been sent giving the specific marks and numbers of the bales from which the ten were to be taken and stating that the sale was ex wharf, that the goods were not "ascertained" goods within s. 52. It was not contended that they were "specific." He held that there had been no ascertainment of the individuality of the bags passing under the contract. Lastly, in *Laurie* v. *Dudin & Sons* (3) the Court of Appeal held that when a delivery order for 200 quarters of maize had been given to the buyers and lodged with the warehouseman in whose custody there were 618 quarters of maize, the holders of the delivery order were not entitled to recover the goods named in the delivery order before an appropriation of the 200 quarters had taken place, that there had been no severance of the 200 quarters from the bulk, and that no property had passed, and that there had been no ascertainment of the

(1) 1907 S.C. 936; 44 S. L. R. 691.

(2) [1918] W. N. 176; 88 L. J. (K. B.) 585.

(3) [1926] 1 K. B. 223.

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goods. Scrutton L.J. in terms followed Lord Dunedin in *Hayman & Son* v. *M'Lintock*. (1)

In *Fothergill* v. *Rowland* (2) Sir George Jessel discussed the jurisdiction exercised by a Court of equity to enforce a contract for the sale and delivery of chattels. The contract in the case was for the sale and delivery of coals, coals gotten and to be gotten from the defendants' mine during a period of years. The price of coal rose, the defendants sold elsewhere at a better price, and entered into a contract to sell the colliery to defeat the plaintiffs' rights under the contract, and the plaintiffs prayed for an injunction to restrain the sale by the defendants, except subject to the agreement to supply the coals to the plaintiffs. The Master of the Rolls said that it must be assumed that that contract was for the sale of a chattel of a very ordinary description, not alleged to be peculiar coal or coal that cannot be got elsewhere, not distinguishable from an ordinary contract for the sale of goods; and of such a contract he says that it was admitted by the counsel before him—Mr. Fry and Mr. Marten—that you cannot obtain specific performance in a Court of equity; and as that remedy could not be granted, he holds, equally, that an injunction could not be granted to restrain the breach by the defendants of one or more stipulations of the contract, where specific performance would not be granted. This case shows the limitations of the jurisdiction of the Court of equity as there interpreted by Sir George Jessel, limitations which were recognized and affirmed in *In re Clarke*. (3) That was a case of a mortgage (inter alia) of all moneys to which the mortgagor might become entitled under a will. The Court, without deciding whether the words of a general assignment were too wide, enforced the contract of mortgage of the moneys coming to the mortgagor under the will. Incidentally Cotton L.J. said: "The ordinary application of the doctrine of specific performance is to compel a vendor or purchaser to complete a contract for sale or purchase, a contract which is wholly executory. Where such a contract

(1) 1907 S. C. 936; 44 S. L. R. 691, 698.

(2) L. R. 17 Eq. 132.

(3) 36 Ch. D. 348, 352.

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relates to goods the Court will not in general decree specific performance. Why is this? Because the Court considers that in general damages are a sufficient remedy, and the proper remedy for the breach of a contract to sell or purchase goods, but that does not apply to a breach of a contract relating to land."

Considering the facts of the present case in the light of the authorities to which I have called attention, it is in my judgment not possible to hold that the 500 tons of wheat ex motor vessel *Challenger* were specific or ascertained goods; and thus specific performance would not be ordered as the remedy of the buyer under s. 52 of the Code. I do not read *Holroyd* v. *Marshall* (1) as conflicting with this view. The first passage relied upon (2) is that in which Lord Westbury says: "A contract for valuable consideration, by which it is agreed to make a present transfer of property, passes at once the beneficial interest, provided the contract is one of which a Court of Equity will decree specific performance." An illustration of what he intended by the above is to be found in *Rose* v. *Watson* (3), in which he also gave the leading judgment. I think that the illustration which he gives as to a contract for the sale of goods must be taken as reported in the Law Journal, already referred to—namely, a contract for the sale of specific goods lying in a specific place. Later he adds: "But all this depends on the contract being such as a Court of Equity would decree to be specifically performed." A condition which he repeats later in his speech; and lastly he says (4): "I have already explained, that a contract relating to goods, but not to any specific goods, would not be the subject of a decree for specific performance, and that a contract that could not be specifically performed would not avail to transfer any estate or interest." Lord Chelmsford's speech is to the same effect.

The effect of *Holroyd* v. *Marshall* (1) was summarized by Cotton L.J. in *Joseph* v. *Lyons* (5), where he says: "In

(1) 10 H. L. C. 191.
(2) Ibid. 209, 210.
(3) 10 H. L. C. 672.
(4) Ibid. 212.
(5) (1884) 15 Q. B. D. 280, 285.

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Holroyd v. *Marshall* (1) it was held, with some doubt on the part of some of the Law Lords, that when future acquired property is assigned, pursuant to a contract capable of specific performance, that property, when it has been sufficiently ear-marked and identified, may pass to the assignee and become his property; it may be that there was not a valid assignment at law, but where there was a valuable consideration, the assignment might be valid in equity."

After speaking of *Holroyd* v. *Marshall* (1) in *Tailby* v. *Official Receiver* (2) Lord Watson says: "There is but one condition which must be fulfilled in order to make the assignee's right attach to a future chose in action, which is, that, on its coming into existence, it shall answer the description in the assignment, or, in other words, that it shall be capable of being identified as the thing, or as one of the very things assigned." Lord Macnaghten (3) rejects the test apparently suggested—if not actually intended—by Lord Westbury in *Holroyd* v. *Marshall* (1)—"Would a Court of equity decree specific performance," as a measure of the rights of the parties or as essential to cases of equitable assignment or specific lien, but he adds the important qualification: "where nothing remains to be done in order to define the rights of the parties, but the Court is merely asked to protect rights completely defined as between the parties to the contract, or to give effect to such rights either by granting an injunction or by appointing a receiver."

So even if the test of the right to specific performance is rejected, there remains the requisite that the rights must be completely defined as between the parties to the contract as to "the thing" in respect of which the right of one is to be enforced against the other. In my judgment there was no such identification of the thing, "the very thing," for the goods were not appropriated nor their individuality ascertained.

The case of *Hoare* v. *Dresser* (4) does not in my judgment conflict with *Holroyd* v. *Marshall* (1) or with what was said

(1) 10 H. L. C. 191.
(2) 13 App. Cas. 523, 533.
(3) 13 App. Cas. 547.
(4) 7 H. L. C. 290, 311.

in *Tailby* v. *Official Receiver*. (1) Lord Chelmsford states the problem as being "whether there was not a contract for timber which, though general at first, was, by the subsequent transactions between the parties, rendered specific, so as to enable Dresser to assert an equitable title to it." Lord Cranworth's words (2), which, as he says, were general and not directly upon the question that arose in the case, if they conflict with the authorities cited, appear too wide and must be considered in the light of the later authority of *Tailby* v. *Official Receiver* (3), and he concludes the passage referred to by saying: "But I apprehend that neither in equity nor in law can there be any jurisdiction to say, that because there is property of the person who ought to have fulfilled his contract, therefore you can make that property available for the specific performance of the engagement." The requisite is that the subject-matter of the contract must have become specific.

Looking then at the present case more particularly from the point of view of equitable assignment, the sub-purchasers cannot fulfil the conditions necessary to give them such a right.

Lord Wensleydale in *Hoare* v. *Dresser* (4) says: "I take it to be perfectly clear that in order to create an equitable assignment, the obligation must be to deliver a particular chattel, not to deliver any chattel."

The doctrine of equitable assignment of goods is discussed by Lord Selborne in the case of *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (5) in relation to funds remitted to meet bills of exchange upon the bankruptcy of the drawer. In that case the evidence was that one of the bills was drawn specially against funds. Lord Selborne asks: "Is that an equitable assignment? Is that an appropriation of such a kind, that from the moment when that transaction took place as between the two banks, the Citizens' Bank would become purchasers pro tanto, to the amount necessary to

(1) 13 App. Cas. 523, 533.
(2) 7 H. L. C. 317, 318.
(3) 13 App. Cas. 523.
(4) 7 H. L. C. 290, 324.
(5) (1873) L. R. 6 H. L. [illegible] 365.

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answer this bill drawn at sixty days' sight, of previous remittances made by the drawers to their agents at Liverpool, in order to provide for that and other bills which they might draw? My Lords, it seems to me that the transaction is simply one of the most ordinary mercantile kind, and perfectly consistent with the ordinary course of dealing between the Liverpool Bank and the drawers of the bills, which upon the whole of the correspondence and the evidence plainly was not one of specific trust or appropriation of any particular funds. The transaction was really of this kind—a person asked to take a bill wants to know distinctly whether the person who has drawn it has made provision for its payment. The statement is, we have sent forward to Liverpool funds of a much larger amount, which are intended to be used in the payment of these and other bills. My Lords, if that be a specific appropriation or an equitable assignment, it follows that every ordinary transaction in commerce, where any inquiry whatever is made, would come into the same category." And see also *Field* v. *Megaw* (1), where specific appropriation is referred to by Montague Smith J. as necessary to bind the fund by equitable assignment.

Howell v. *Coupland* (2) was much insisted upon by the respondents, but it appears to me not to be an authority on the point here in question. The subject-matter of the contract was held to be specific upon the same basis as the debts in *Tailby* v. *Official Receiver* (3), but the point decided was that on the failure of the crop, the principle of *Taylor* v. *Caldwell* (4) applied, and performance of the contract was excused for the reason that the contract must be interpreted as being subject to the implied condition that the parties should be excused if, before breach, performance became impossible from the perishing of the subject-matter of the contract without default on the part of the seller. Lord Coleridge C.J. (5) said: "It was not an absolute contract of delivery under all circumstances, but a contract to deliver

(1) (1869) L. R. 4 C. P. 660, 663.
(2) L. R. 9 Q. B. 462; 1 Q. B. D. 258.
(3) 13 App. Cas. 523.
(4) (1863) 3 B. & S. 826.
(5) 1 Q. B. D. 258, 261.

so many potatoes, of a particular kind, grown on a specific place, if deliverable from that place. On the facts the condition did arise and the performance was excused."

In *Snell* v. *Heighton* (1) Grove J. held that there was no appropriation to a sale of 60,000 bricks part of a bulk of 117,000 where the vendor had applied all but 62,000 to other purposes, and had left this balance only out of which he could fulfil his contract.

The cases which decided that a purchaser had an insurable risk, such as *Inglis* v. *Stock* (2) and *Sterns, Ld.* v. *Vickers, Ld.* (3), do not assist in the present case. In those cases, whether the property had or had not passed, the risk of loss from something happening to the goods, or from deterioration in their quality, passed to the purchaser, even though the identification of the goods remained incomplete, or the portion of the goods sold remained unsevered from the bulk.

For the reasons I have given and upon the authorities to which I have referred, in my judgment the appeal must be allowed and the orders of the Divisional Court and of the county court judge set aside, and the motion of the sub-purchasers of March 3 refused, with costs here and below.

I desire to add that I much regret to find that I am differing not only from the judges in the Divisional Court, but also from Sargant L.J. Naturally I have reluctance in doing so. My justification must be that I have taken a view of the facts of the case which differs from that of Sargant L.J., and thereupon it has appeared to me that the question for decision was governed by the mercantile law applicable to a not uncommon contract for the sale of goods.

ATKIN L.J. This case has resulted in a decision which if correct will have far-reaching effects upon commercial transactions. It has the support of the judgments of both learned judges below, and also of Sargant L.J., and therefore in expressing my opinion that it was wrongly decided I feel bound to examine in some detail the facts and contentions relied on by the parties.

(1) (1883) Cab. & Ell. 95. (2) 10 App. Cas. 263.
(3) [1923] 1 K. B. 78.

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Both the debtor and the claimant are grain merchants in Bristol. On November 20, 1925, by a written contract on form 22 of the London Corn Trade Association Messrs. W. H. Pim, Junior, & Co., Ld., acting for Messrs. Balfour Williamson & Co., of London, agreed to sell to the debtor 1000 tons Western White wheat. Shipment was to be in good condition per motor vessel *Challenger*, expected to load between December 16–31, 1925, from Oregon and/or Washington as per bill or bills of lading to be dated accordingly when the goods were actually on board. The price was 57*s.* per 480 lbs. shipped in bulk and/or bags including freight and insurance to Avonmouth direct or indirect for liners. The terms of payment were cash against documents, or alternatively by buyer's acceptance of seller's or shipper's draft with documents attached at thirty days from arrival of bill of lading in London on terms which for present purposes are immaterial. The contract contains the usual stipulations of the London Corn Trade Association in such agreements dealing with policies, delivery, and arbitration. It is an ordinary commercial contract for the sale c.i.f. of grain to be imported to England from the United States of America. It is a contract for the future shipment of grain not, at the time, ascertained. It is not the sale of a cargo. Apart from some appropriation of the goods to the buyer with his express or implied assent at or after shipment, which would, I think, be unusual, the buyer would acquire no property in any grain until he took up the documents in exchange for cash or acceptance.

On November 21, 1925, the debtor by a contract in writing agreed to sell to the claimants 500 tons Western White wheat per motor vessel *Challenger*, expected to load between December 16–31, 1925, bill of lading to be dated accordingly at 57*s.* per 480 lbs. c.i.f. to Bristol direct or indirect plus one-half of 1 per cent. Other terms as per our London contract November 22. The form of contract ends with the following clause partly printed, partly written: "The wheat sold as above is part of a parcel bought from Messrs. Balfour Williamson & Co. under contract dated November 20,

and in the event of their not duly fulfilling the same it is understood that Messrs. Wait & James (the sellers) are not to be held liable to buyers." This agreement seems to me to give the sub-buyers no different rights from those of the debtors, the original buyers, against Messrs. Balfour Williamson & Co., except that a condition is added which operates solely for the benefit of the sellers under the second contract. Inasmuch as some importance was attached to this clause by the respondents, I may state that in my opinion the clause has not the effect for which they contend; though if it had, the result would not be affected. It seems to me that the clause is not part of the description of the goods; if it were, then if the name of Balfour Williamson & Co., or the date of the contract with them, were wrongly stated the buyers could reject the goods. The statement of name of seller and date of contract is made to define the condition; so that the sub-seller would not relieve himself of liability unless the named seller under the named contract failed to deliver to him. In my opinion a tender of documents of wheat of the contract description per motor vessel *Challenger* dated in accordance with the contract would be a good tender however and from whomsoever the sub-seller obtained them.

It appears that by other contracts the debtors had agreed with other sellers for the purchase from them of further grain to be shipped per the *Challenger*. He had a contract for the delivery of a further 500 tons of Western White wheat and 1500 tons of No. 2 Northern wheat. All this wheat was shipped on the *Challenger* on bills of lading bearing dates that conformed to the contracts of sale. The wheat was shipped in bulk. Of the Western White wheat 1190 tons were shipped in the after-hold, and 310 tons in No. 2 hold. On February 28 the *Challenger* arrived at Avonmouth bringing the wheat as described above. Meanwhile other events material to this decision had occurred. On December 22 the debtor gave the claimants particulars of the date of the bill of lading for motor vessel *Challenger* to satisfy the contract of November 21. On January 4 the bills of lading arrived in this country and were sighted by the consignees making

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the prompt date under the contract February 6. On the same date the debtor rendered to the claimants a provisional invoice for 5933*l.* 5*s.*, the price of the 500 tons less freight; on February 3 the debtors passed to the claimants a debit note for Western White wheat for 5933*l.* 5*s.* stating the prompt to be February 6, which was a Saturday, with a note appended: "Kindly let us have your cheque for the above amount on Friday morning, and oblige." And on the Friday, February 5, the claimants gave the debtor a cheque for 5933*l.* 5*s.*, which was paid in to the general credit of the debtor's account with the Westminster Bank, Bristol, and credited on that day, the account being then largely overdrawn. An attempt was at one time made to suggest that the cheque was specially appropriated at the time by the bank or the debtor or both to the repayment of an advance made by the bank to take up the bill of lading for 1000 tons of wheat under which the contract with the claimants was to be fulfilled; and the contention was said to be supported by a letter from the claimants dated February 20. It appeared that the writer expressed an allegation of fact rather in hope than with accuracy; and Mr. Luxmoore expressly disclaimed any case that any trust was created as to this sum of money. It is obvious that it went into the debtor's account generally and reduced the general balance. The debtor's bank had made advances to enable the debtor to take up the bills of lading in question; and at this date held the documents as security against such advances on the terms of hypothecation notes dated February 6. In view of the disclaimer mentioned above I need not refer in greater detail to the subsequent bookkeeping operation of the bank.

On February 23 the debtor, who was in difficulties, called a meeting of his creditors, and on February 24 on his own petition a receiving order was made, and he was adjudicated bankrupt, Mr. Collins being appointed special manager of the estate. On March 5 he was appointed trustee in bankruptcy of the estate. On February 27 Mr. Collins took up from the bank the bills of lading, giving them a cheque for the full amount less the sum of 5933*l.* 5*s.*, which the bank allowed

to be treated as a credit against the advance. Having received the bills of lading he was able to deal with the wheat. Of the 1500 tons Western White wheat, 830 tons were delivered to Messrs. Spiller & Baker ex ship; some further wheat was delivered to the purchasers; and at the time the motion was launched the trustee had in warehouse 530 tons available for performance of the contract with the claimants, but which was in fact property of the debtor or possibly only of the trustee available for distribution amongst the creditors generally. The trustee, however, would take the property subject to any equity affecting it in favour of these particular creditors; and the question is whether they had any, and if so, what.

It will be noticed from the above statement of facts that no 500 tons of wheat have ever been ear-marked, identified or appropriated as the wheat to be delivered to the claimants under the contract. The claimants have never received any bill of lading, warrant, delivery order or any document of title representing the goods. Nor can 500 tons or any less quantity be ascertained by subtracting from the bulk in the trustee's possession known quantities the property of the purchasers. The trustee has in his possession in warehouse 530 tons of Western White wheat. It is not suggested that this is not an ordinary commercial commodity. It is, however, said: (*a*) that the claimants are entitled to have the contract of sale of November 21 specifically performed by a direction to the trustee to weigh out and deliver 500 tons to the claimants, or (*b*) that the transactions between the parties have resulted in an equitable assignment to the claimants of either the whole bulk of 530 tons or at any rate of 500 tons of it, so as to entitle the claimants to have 500 tons delivered to them; or to have a charge upon the bulk or 500 tons of it to secure the sum of 5933*l.* 5*s.*, which the firm paid in advance. I have treated these as separate contentions, because at times in the argument they were treated separately, though at times they appeared to overlap. In any case, however, I am of opinion that the claimants fail, and that to grant the relief claimed would violate well established principles of common law and equity. It would also appear to embarrass to a

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most serious degree the ordinary operations of buying and selling goods, and the banking operations which attend them. The claim of the claimants to specific performance in their argument in the Courts below and before us was based solely on the provisions of s. 52 of the Sale of Goods Act, 1893. That section is a re-enactment in an amended form of s. 2 of the Mercantile Law Amendment Act, 1856, which gave the remedy in all actions and suits for breach of contract to deliver specific goods for a price in money. The present section gives the remedy "in any action for breach of contract to deliver specific or ascertained goods." It is not easy to discover the reason for adding the words "or ascertained." It is, however, clear that "specific goods" bear the meaning assigned to them in the definition clause "goods identified and agreed upon at the time a contract of sale is made." "Ascertained" probably means identified in accordance with the agreement after the time a contract of sale is made, and I shall assume that to be the meaning. It seems to be beyond dispute that at the date of this contract there were no goods identified and agreed upon; and I think it equally clear that at no time were there any goods ascertained. For the purpose of this case it is unnecessary to consider whether this section was intended to give the purchaser a larger remedy than he had in Courts of equity before the section in the Act of 1856 was passed. Speaking generally, Courts of equity did not decree specific performance in contracts for the sale of commodities which could be ordinarily obtained in the market where damages were a sufficient remedy. Possibly the statutory remedy was intended to be available even in those cases. But the Code appears to have this effect, that in contracts for the sale of goods the only remedy by way of specific performance is the statutory remedy, and it follows that as the goods were neither specific nor ascertained the remedy of specific performance was not open to the creditors.

An attempt was made to show that the goods were specific goods by citing the decision of *Howell* v. *Coupland* (1), and arguing that as the goods were called specific there, the term

(1) L. R. 9 Q. B. 462; 1 Q. B. D. 258.

in the Sale of Goods Act, despite the statutory definition, must be used in the same sense. And it was said that in any case s. 7 of the Code reproduces the decision in *Howell* v. *Coupland* (1), and as it uses the word "specific," the meaning must differ from the statutory definition. These contentions appear to me to ignore the true use of the Code, and to misinterpret *Howell* v. *Coupland*. (1) That case was a claim for damages for non-delivery of 120 tons of potatoes under a contract for the purchase of 200 tons of Regent potatoes grown on land belonging to the seller in Whaplode to be riddled $1\frac{5}{8}$ths inch riddle and delivered at railway station as purchaser may direct, the purchaser to find riddles. The crop had failed and the seller could only deliver eighty tons. It was held that on the principle of *Taylor* v. *Caldwell* (2) he was relieved from further performance of the contract. Blackburn J. says it is a contract for the delivery at a future time of a specific thing so far as this, that it is for the delivery of a portion of a specific thing, in other words the Court implied a condition that a particular thing, the crop, should come into existence or remain in existence. This case had no reference to "specific or ascertained" for the purpose of passing the property or of specific performance, and I conceive that it would have startled Lord Blackburn if the whole crop had come into existence, to have it contended that 200 tons under the contract had been ascertained before they were both separated and riddled. The case of *Howell* v. *Coupland* (1) would now be covered either by s. 5, sub-s. 2, of the Code or, as is suggested by the learned authors of the last two editions of Benjamin on Sale, by common law principles retained by s. 61, sub-s. 2, of the Code.

Inasmuch as we are now bound by the plain language of the Code I do not think that decisions in cases before 1893 are of much value, but I must refer to two cases in which two equity lawyers of great authority have uttered dicta on which the creditors' counsel naturally rely. The first is *Hoare* v. *Dresser* (3), in which Dresser, who sold on

(1) L. R. 9 Q. B. 462; 1 Q. B. D. 258. (2) 3 B. & S. 826.
(3) 7 H. L. C. 290.

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del credere commission for one Norrbom, a Swedish timber merchant, made advances to Norrbom on assurance that certain cargoes would be shipped consigned to him. In fact the cargoes were shipped, but the bills of lading were negotiated to Hoare. Dresser claimed an equitable charge over the cargoes to the extent of his advances; but it was held that whatever right he had would not prevail against the legal title which Hoare got from receipt of the bills of lading without notice. So far the case has little to do with the point of specific performance which we are considering. Lord Cranworth in his speech uses these words (1): "At law there must be a positive appropriation to give a legal title; that was established in *Wait* v. *Baker*. (2) So that however unjustly a party may be acting who says, I shall send you from abroad some timber by a particular ship, if in truth he sends it so as to make it the legal property of another, that legal property must prevail. The difference between law and equity I take to be this: that if there has been an engagement to appropriate a particular cargo, or an engagement to satisfy a contract out of a particular thing, such as to appropriate a part of a larger cargo, in either of those cases equity will interfere, in the one case, to decree what in truth is a specific performance, or something very like a specific performance of the contract to appropriate a particular cargo; and, in the other, to give the purchaser a lien upon the larger cargo, in order to enable him to satisfy himself of the smaller demand. As if a merchant here were to order from the Black Sea a cargo of 100 quarters of wheat, and the correspondent were to say: 'I have sent a cargo containing 500 quarters, with directions out of it to let you have 100 quarters'; when the 500 quarters arrive, unless there be some legal or equitable right on the part of the holder to interfere, equity will give the merchant a lien upon the larger cargo, just as it would, out of a large fund of money, give a lien on the appropriation of a smaller sum to any person who was equitably entitled to it. But I apprehend that neither in equity nor in law can there be any jurisdiction

(1) 7 H. L. C. 317. (2) 2 Ex. 1.

to say, that because there is property of the person who ought to have fulfilled his contract, therefore you can make that property available for the specific performance of the engagement. I have thought it necessary to say this much; but that question does not properly arise here, because, in my opinion, if Dresser had taken the proper steps upon the arrival of the cargo, and before any liability had been incurred by Hoare & Co., I strongly incline to think that he had an equitable right upon this timber." I confess that I do not fully comprehend, and no one in argument explained, to what particular set of facts the learned Lord was referring when he spoke of an engagement to appropriate a particular cargo. If he meant an agreement to sell a named cargo, there can be no question that the goods would be goods "identified and agreed upon at the time the sale was made" and specific performance might be granted in the terms of the Act of 1856 and the Code, though the learned Lord does not seem to have had in his mind the rule that specific performance is not usually granted of a contract for the sale of ordinary mercantile commodities. Moreover, in the case he puts, if no more appeared, the property would obviously pass at law as soon as the contract was made. And the same would be true if the engagement was to sell a future named cargo as soon as the cargo was put on board. "The engagement to appropriate part of a larger cargo" which Lord Cranworth says would entitle the purchaser to a decree for a lien on the larger cargo in order to enable him to satisfy himself of the larger demand, is more difficult. If a merchant were to "order" a cargo of 100 quarters of wheat from the Black Sea (a Lilliputian cargo) and the foreign merchant were to send him 100 quarters out of a cargo of 500, with great respect, there would be no contract. I assume that Lord Cranworth had in his mind an agreement for the purchase of 100 quarters followed by a direction by the seller to some one (query the master or the consignee) to deliver to the purchaser 100 quarters. No doubt such a direction might amount to an equitable assignment of 100 quarters, and if so, equally, no doubt, the assignment

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could be enforced against the bulk. But in that case the equitable assignment arises not out of the contract of purchase, but the independent direction to a third person communicated to the buyer. But obiter dicta as to legal relations created by commercial transactions in a world where bills of lading and delivery orders appear to be ignored, do not, I confess, appear to me to afford solid foundation for decision of rights in a different and more real environment.

The other case is *Holroyd* v. *Marshall* (1), where the question concerned the rights created in equity by an agreement to assign after-acquired property. The principles laid down in that case and in *Tailby* v. *Official Receiver* (2) are perfectly well established, and as far as I know, are not disputed by any one in this case. But Lord Westbury in giving judgment is said in the report of *Holroyd* v. *Marshall* in the House of Lords Cases (3) to have used these words: "A contract for the sale of goods, as, for example, of five hundred chests of tea, is not a contract which would be specifically performed, because it does not relate to any chests of tea in particular; but a contract to sell five hundred chests of the particular kind of tea which is now in my warehouse in Gloucester, is a contract relating to specific property, and which would be specifically performed." The report in the Law Journal (4) indicates that the former report may be inaccurate; in any case, the criticism of Fry L.J. on this dictum in his book on Specific Performance, para. 82, seems well founded and weakens its authority.

I now proceed to discuss the suggestion that apart from the right to specific performance under s. 52 of the Code, there was in this case an equitable assignment to the claimants of 500 tons of flour which entitled them to claim from the trustee delivery of 500 tons out of the 530 tons remaining in his possession, and, indeed, gave the claimants a charge or lien over the whole 1000 tons to which the debtor was entitled under his contract with Balfour Williamson & Co. In the view that I have taken of the facts of this case, I have

(1) 10 H. L. C. 191.
(2) 13 App. Cas. 523.
(3) 10 H. L. C. 191, 209.
(4) 33 L. J. (Ch.) 193, 196.

already said that the goods were never so ascertained that specific performance could have been ordered of them. This consideration would appear to defeat the supposed equitable assignment, and I will not repeat the passages referred to by the Master of the Rolls which establish the test. I have already indicated my own view of the claimants' contract of November 21 and suggested that the debtor does not in fact agree to sell to the claimants any aliquot part of the 1000 tons, which in fact he had agreed to buy from Balfour Williamson & Co. But even if he had, I do not think that at any time here there was an equitable assignment which ever gave the claimants a beneficial interest in these goods. It has been difficult to elicit the moment of time at which the beneficial interest came into existence. At various times in the argument it has been the moment when the 1000 tons were shipped; when they were declared to the debtor by Balfour Williamson & Co.; when the bills of lading came into the possession of the bank; when the claimants paid the 5933*l.* 5*s.* to the debtor; when the goods were taken up by the trustee; and when the 530 tons came into the possession of the trustee. The difficulty illustrates the danger of seeking to conduct well established principles into territory where they are trespassers. Without deciding the point, I think that much may be said for the proposition that an agreement for the sale of goods does not import any agreement to transfer property other than in accordance with the terms of the Code, that is, the intention of the parties to be derived from the terms of the contract, the conduct of the parties and the circumstances of the case, and, unless a different intention appears, from the rules set out in s. 18. The Code was passed at a time when the principles of equity and equitable remedies were recognized and given effect to in all our Courts, and the particular equitable remedy of specific performance is specially referred to in s. 52. The total sum of legal relations (meaning by the word "legal" existing in equity as well as in common law) arising out of the contract for the sale of goods may well be regarded as defined by the Code. It would have been futile in a code

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intended for commercial men to have created an elaborate structure of rules dealing with rights at law, if at the same time it was intended to leave, subsisting with the legal rights, equitable rights inconsistent with, more extensive, and coming into existence earlier than the rights so carefully set out in the various sections of the Code.

The rules for transfer of property as between seller and buyer, performance of the contract, rights of the unpaid seller against the goods, unpaid sellers' lien, remedies of the seller, remedies of the buyer, appear to be complete and exclusive statements of the legal relations both in law and equity. They have, of course, no relevance when one is considering rights, legal or equitable, which may come into existence dehors the contract for sale. A seller or a purchaser may, of course, create any equity he pleases by way of charge, equitable assignment or any other dealing with or disposition of goods, the subject-matter of sale; and he may, of course, create such an equity as one of the terms expressed in the contract of sale. But the mere sale or agreement to sell or the acts in pursuance of such a contract mentioned in the Code will only produce the legal effects which the Code states.

But without deciding this point, we have to apply the words of Lord Westbury in *Holroyd* v. *Marshall* (1): "In equity it is not necessary for the alienation of property that there should be a formal deed of conveyance. A contract for valuable consideration, by which it is agreed to make a present transfer of property, passes at once the beneficial interest, provided the contract is one of which a Court of equity will decree specific performance. In the language of Lord Hardwicke, the vendor becomes a trustee for the vendee; subject, of course, to the contract being one to be specifically performed. And this is true, not only of contracts relating to real estate, but also of contracts relating to personal property, provided that the latter are such as a Court of equity would direct to be specifically performed." It must be remembered that while Lord Westbury's

(1) 10 H. L. C. 191, 209.

proposition that a contract for valuable consideration, by which it is agreed to make a present transfer of property, passes at once the beneficial interest, provided the contract is one of which a Court of equity will decree specific performance, may be beyond dispute, the converse that when there is a contract of which the Court of equity will decree specific performance the beneficial interest has passed is not logically true, and is not the law. Nor is it true that in equity when a man agrees in a contract for the sale of goods to sell part of a specified whole, he agrees to make a transfer of property either present or when the property is in fact acquired. Agreements by a farmer to sell a lamb out of his flock, a ton of potatoes out of his crop grown on his farm, a bushel of apples from his orchard, a gallon of milk from this morning's milking, an egg out of the eggs collected yesterday, seem to me not to amount to an equitable assignment of any of the matters sold, or to give an equitable charge or lien over the whole subject-matter to secure the delivery of the part. The doctrine asserted seems to produce the result that in every case of the sale of future goods, as soon as the goods have become identifiable, the beneficial interest in them passes to the buyer, notwithstanding the provision in the Code that, in the absence of express intention, the property only passes when goods of that description and in a deliverable state are appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, and apparently notwithstanding an express agreement that the property shall not pass except on payment. So to hold would be to defeat the intention of the parties, either express or to be implied from their contract being bound by the terms of the Code, and it appears to me not to accord with the principles of equity to impose upon the parties rights which are contrary to their manifest intention.

Does it make any difference that the creditors here paid their purchase money in advance of the due date, and in any case before they could get delivery under the contract? I think not. So far as specific performance is concerned, the right seems to exist, if at all, independently of whether

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one party or the other has performed his part of the contract; and I have already dealt with the objections to the demand for specific performance under the provisions of s. 52 of the Code.

Lord Westbury in *Holroyd* v. *Marshall* (1) uses wide words in the passage beginning: "But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a Court of equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract. For if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained." I cannot help thinking that in his reference to property real or personal, the learned Lord was not directing his mind to contracts for the sale of goods which ordinarily would not be "of that class of which a Court of equity would decree the specific performance." I cannot believe he intended that in the cases suggested above the farmer, the seller, would hold the lamb, or the potatoes, or the bushel of apples or the egg in trust for the purchaser as soon as they were ascertained, much less, as these words are supposed to mean, as soon as they were acquired by the seller. Similarly, I fail to see how the payment of the price can convert that which was not an equitable assignment before the payment, into an equitable assignment after the payment. Payment of the price has no doubt been material in considering

(1) 10 H. L. C. 191, 211.

a different question—namely, the right of the purchaser in a contract for the sale of real property, who pays the price or portion of the price before conveyance, to be given a lien on the land for his purchase price. The right is correlative to and appears to be derived from the right of the unpaid vendor of real property to claim a lien on the land after conveyance for the unpaid purchase price. But the latter lien in my judgment does not exist in the case of an ordinary sale of goods. The remedies are defined. The unpaid vendor has a lien which is a possessory lien ; and has a right of stoppage in transitu ; but in my experience no one has ever claimed or been given in the countless cases that have arisen of vendors of goods remaining unpaid after delivery, a right to a lien over the goods in the possession of the purchaser. Similarly, the purchaser who in pursuance of the contract of sale has paid the purchase price or part of it before delivery has never claimed or received a lien over the property which is in the hands of the vendor. I am satisfied that such liens would be quite inconsistent with the provisions of the Code, and do not exist.

It is, however, said, " does not common honesty demand that such a beneficial interest should be created ? " The answer is, I think, that the test of honesty is inadequate, it is too narrow or too wide. The sphere of honesty is not confined to dealings with beneficial interests in property. Many would think that deliberately to break a contract for the sale of future goods, where no question of property at law or in equity could arise, would be dishonest ; but the law gives only a remedy in damages. In the simple cases suggested, which I hesitate to repeat, the farmer might be acting dishonestly in parting with the whole of his flock, his apples, his potatoes or his eggs to a different purchaser ; but I venture to think that if he does the purchaser even with notice acquires a complete title to the property bought.

This brings me to the last subject of this too lengthy judgment. If the contentions put before the Court for the claimants be correct and beneficial interests in property are created as suggested, the whole course of business

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transactions will be fundamentally affected. Many large business transactions such as this, indeed nearly all import transactions, are financed by banks or financial houses, as this was. It is quite common for the banker to be given information of sub-sales, indeed he often asks for it, or it is proffered voluntarily as some guarantee of the stability of the bank's customer. Such notice was given here. If notice of the sub-sale under a contract which becomes specific when delivery is made, is notice of equitable interests in the sub-purchasers, the bank would be affected even though by taking the bills of lading, or other documents, they acquired the legal title. They would have to satisfy themselves on being paid off that the equitable interests were not being defeated, and their own powers of disposition if their customer made default would be enormously restricted. Presumably they would have to communicate with each sub-purchaser. The effect of the decision below when once appreciated would throw the business world into confusion, for credit would be seriously restricted.

The nett result of this decision is that the buyer of goods in these circumstances is in no better position in bankruptcy than a seller. If a seller of goods delivers them to the buyer before payment, trusting to receive payment in due course, and the buyer becomes bankrupt, the seller is restricted to a proof, and can assert no beneficial interest in the goods. There seems no particular reason why a different principle should prevail where a buyer hands the price to the seller before delivery of the goods trusting to receive delivery in due course. In both cases credit is given to the debtor, and the buyer and the seller respectively take the well known risk of the insolvency of their customer.

I regret to differ from the opinion of the judges below and my brother Sargant. I do not think that there is any difference as to the existence of the principles of equity which are involved. They are well settled, and beyond doubt in their own sphere beneficial. The difference has been as to their application to such facts as appear in this case, and I feel bound to repel the disastrous innovations which in my

opinion the judgments under review would introduce into well settled commercial relations. I think this appeal should be allowed and the motion dismissed with costs here and below.

SARGANT L.J. I am sorry to find myself in disagreement with the majority of the Court in this case, and the more so because my disagreement is complete and fundamental. In the circumstances of this case, I am of opinion that there had, prior to the bankruptcy, been created in favour of the respondents equitable rights of the nature of equitable lien or equitable assignment in respect of this wheat, which were enforceable against the bankrupt or his trustee in bankruptcy, and which prevented the wheat vesting in the trustee otherwise than subject to those equitable rights.

The most important document in the transaction is undoubtedly the sold note dated November 21, 1925, which forms the contract between the bankrupt, trading as Wait & James, or as Wait & Co., and the respondents. By this contract, the bankrupt agreed to sell the respondents a definite quantity or portion—namely, 500 tons, or one-half of a parcel of 1000 tons of Western White wheat agreed to be bought by the bankrupt from Balfour Williamson & Co. under a contract of the previous day, that is to say, a parcel of 1000 tons Western White wheat to be shipped between December 16 and 31, 1925, on board a motor vessel named the *Challenger*. The contract of November 21 was thus obviously not a general contract for the purchase of 500 tons of Western White wheat, but a contract for the purchase of a definite portion of a specific parcel of that wheat to be shipped within a definite period on a named vessel, and the contract would necessarily fail of its own inherent force, should there not be a shipment in accordance with the earlier and larger contract. But to render this additionally plain, there was added to the contract a special provision in these terms—namely, " The wheat sold as above is part of a parcel bought from Balfour Williamson & Co. under contract dated November 20, and in the event of their not

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duly fulfilling same, it is understood that Messrs. Wait & James are not to be held liable to buyers." And further, the contract of November 21, 1925, being in respect not of an ascertained parcel or part of an ascertained parcel of wheat, was obviously incapable of transferring the property in that parcel or in any part of it, and operated merely as an executory contract for the sale of a definite portion of that parcel if and when it was ascertained by virtue of its subsequent shipment on board the *Challenger* in accordance with the contract of November 20. There can, I think, be no doubt that this was the effect of such a contract, apart from and independently of the Sale of Goods Act, 1893, and the same result obtains under s. 5 of that Act.

A parcel of 1000 tons Western White wheat was in fact shipped by the agents of Messrs. Balfour Williamson & Co. on the *Challenger* on or about December 21, 1925, in accordance with their contract of November 20, 1925, and a bill of lading of December 21 was duly made out and forwarded to the Westminster Bank, who were financing the transaction for the bankrupt. Thenceforward, the general property in the 1000 tons of this wheat appears to have been in the bankrupt, and the special property in it in the bank. But nothing seems to turn on this. Further, the cargo on the *Challenger* also comprised a further 500 tons of Western White wheat, shipped to the bankrupt by other vendors, Sanford & Co., under bill of lading of December 22, 1925, and 1000 tons—I think it was 1000 and not 1500 tons—of another variety of wheat—namely, Northern wheat, also consigned to the bankrupt, both these parcels being financed in the same way by the Westminster Bank. It also appears that the two shipments of Western White wheat were not in fact stowed quite separately, 1190 tons of this wheat being in the after-hold and 310 tons of it being on the top of No. 2 hatch. But no importance seems to me to attach to either of these circumstances, since these were three distinct shipments, and there was a separate special property and general property in each of the three parcels—namely, the 1000 tons Western White wheat, the 500 tons Western White wheat, and the 1000 tons

of Northern wheat under each of the three separate bills of lading relating thereto respectively.

On December 22, 1925, the bankrupt informed the respondents that the wheat had been shipped in the *Challenger* on the previous day. The price of the wheat was payable in London thirty-three days after sight of documents in London, that is, thirty-three days after January 4, 1926, or on February 6, 1926. Just previously to that date the bankrupt forwarded to the respondents a provisional invoice of the wheat which showed that, after deducting a freight of 30*s.* per ton, which was payable only on arrival at the port of destination, Avonmouth, the price payable was 5933*l.* 5*s.*, and this sum was paid by the respondents to the bankrupt by cheque on February 5 or 6. The *Challenger* duly arrived at Avonmouth on February 28, 1926, but before that date, namely, on February 17, the bankrupt committed an act of bankruptcy, and he was adjudicated on February 24; and a Mr. Collins, who was first appointed special manager and afterwards the trustee of his estate, declined to recognize any title of the respondents to any part of the Western White wheat in question and left them to prove in bankruptcy for the purchase money they had already paid.

In this state of things, the learned county court judge, while holding that the respondents had no specific right entitling them to the 500 tons of wheat on payment of the balance of their purchase money, came to the conclusion that on the principles of *Ex parte James* (1) it would be inequitable to allow the trustee to retain both the purchase money and the wheat, and ordered repayment by the trustee to the respondents of the 5933*l.* 5*s.* so paid by them. On the other hand, the Divisional Court, while declining to act on the principle of *Ex parte James* (1), decided that the respondents' contract was one for the purchase of specific goods within the Sale of Goods Act, 1893, and that the respondents were entitled to the 500 tons of wheat or the proceeds thereof on paying the balance of 750*l.* due in respect of freight.

(1) (1874) L. R. 9 Ch. 609.

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It is admitted by the respondents that they cannot rely on the view taken by the learned county court judge, and that they must succeed, if at all, on showing that they had some definite equitable right or lien in respect of the wheat on the *Challenger* entitling them to claim 500 tons of the parcel of 1000 tons comprised in the bill of lading of December 21, 1925, on payment of the balance of the agreed purchase-money—namely, 750*l.* The appellant denies any such right and says that they were only entitled to the personal obligation of the bankrupt to deliver 500 tons of any Western White wheat, that this was a general obligation sounding in damages only, and that accordingly they are only entitled to prove in the bankruptcy for the breach of this obligation, or, what is substantially the same thing, for the 5933*l.* 5*s.* paid by them.

The question has to be determined on a consideration of the relative positions of the bankrupt and the respondents just before the commencement of the bankruptcy. At this time the wheat contracted to be purchased by the respondents had been definitely ascertained under their contract and notification and invoice, as 500 tons, or one half, of the particular parcel of 1000 tons then on board the *Challenger* and comprised in the bill of lading of December 21, 1925. The bankrupt was bound to deliver and the respondents were entitled to receive 500 tons out of that very parcel of 1000 tons. The bankrupt's obligation could not be discharged by the delivery of 500 tons of Western White wheat derived from any other source, not even by the delivery of the whole or a part of the 500 tons shipped on the *Challenger* by Sanford & Co. under the bill of lading of December 22, 1925; though no doubt if the quality of that wheat were the same, as it would seem to have been through its being shipped partly intermixed with the other wheat, the purchasers might have accepted the substituted wheat or any part thereof that was delivered to them as being equivalent to what they had purchased. But as a matter of strict contract the only wheat which was deliverable under the respondents' contract, and which could be forced on them

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Company—Voluntary Liquidation—Surplus Assets—Principle of Division between Preference and Ordinary Shareholders—Construction of Articles—Profits.

In 1889 a company was formed with a nominal capital of 200,000*l.* in 1*l.* shares for the purpose of carrying on a waxworks exhibition. Only 75,000*l.* in fully paid up ordinary shares were issued at first, and in 1902 an issue of 50,000 preference shares was sanctioned, of which 25,950 were subscribed for and entitled the holders to a fixed cumulative preference dividend of 5 per cent. in priority to the ordinary shares, but not conferring any priority as regards capital. By art. 130 (15.) of the articles of association the directors were empowered before recommending any dividend to set aside, out of the profits of the company, a reserve fund to meet contingencies, and to invest the several sums so set aside as they thought fit. By art. 131 it was provided that subject to the rights of members entitled to shares issued upon special conditions the profits of the company should be divisible among the members in proportion to the amount paid up on the shares held by them respectively. In 1925 the exhibition building and most of its valuable contents were burned in a fire, and a total sum of 170,000*l.* was received from insurance offices and realized by a sale of the site of the premises. In 1926 the company was wound up voluntarily and the liquidator paid all dividends and debts, and returned the whole of the paid up capital to the shareholders. There remained surplus assets of about 70,000*l.* On a summons by the liquidator to ascertain how this sum should be distributed as between the preference and the ordinary shareholders:—

Held, that as long as the company was a going concern the preference shareholders were entitled only to the preferential dividend, but on the voluntary winding up this preference was determined, and thenceforward the preference shares retained no preference or priority over the ordinary shares.

Held, further, that, according to the constitution of the company the prima facie presumption in favour of equality of distribution amongst all the shareholders ought to obtain, and these surplus assets (including deposit interest) would be distributed amongst all the shareholders pro rata in proportion to the amount paid up on their shares.

In re Bridgewater Navigation Co. [1891] 1 Ch. 155; [1891] 2 Ch. 317 distinguished.

ADJOURNED SUMMONS.

On February 27, 1889, the company of Madame Tussaud & Sons, Ld., as incorporated under the Companies Acts. The

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nominal capital of the company was 200,000*l.* divided into 200,000 shares of 1*l.* each, with power under the memorandum and articles to increase the capital and to issue any of the original shares or shares of increased capital as preferential or guaranteed or deferred shares.

The objects for which the company was established were: (1.) To acquire the business of the exhibition carried on in Marylebone Road, London, under the name of "Madame Tussaud & Sons" then belonging to Josiah Thomas Poyser, and the whole of the real and personal property belonging to J. T. Poyser in connection with the said business, and to undertake all or any of the liabilities of J. T. Poyser in relation to such business. (2.) To carry on business as proprietors and exhibitors of waxworks, relics, curiosities of all kinds, and other objects suitable for a public exhibition, manufacturers of waxworks, restaurant proprietors, licensed victuallers, etc. Other objects set forth in the memorandum of association included: (*a*) To sell the undertaking of the company or any part thereof for such consideration as the company might think fit, and, in particular, for shares, debentures, or securities of any other company having objects altogether or in part similar to those of the company. Under the memorandum and articles of association of the company the directors had power to issue shares with such rights and privileges annexed thereto as the general meeting resolving upon the creation thereof should direct, and if no direction were given then as the directors should determine, and in particular such shares might be issued with a preferential or qualified right to dividends in the distribution of assets of the company and with a special or without any right of voting. By art. 130 (15.) of the articles of association the directors were empowered, before recommending any dividend, to set aside out of the profits of the company a reserve fund to meet contingencies and to invest the several sums so set aside as they thought fit. By art. 131 it was provided that subject to the rights of members entitled to shares issued upon special conditions, the profits of the company should be divisible among the

members in proportion to the amount paid up on the shares held by them respectively. There was, in fact, no provision in the articles for the distribution of the surplus assets of the company in a winding up, if such surplus assets should be more than sufficient to repay the whole of the paid up capital. By art. 132 the company in general meeting might declare a dividend to be paid to the members according to their rights; and by art. 133 no dividend should be payable except out of the profits arising from the business of the company. By art. 164 it was provided that if the company should be wound up and the surplus assets be insufficient to repay the whole of the paid-up capital such surplus assets should be distributed so that as nearly as might be the losses should be borne by the members in proportion to the capital paid up on the shares held by them respectively at the commencement of the winding up, but without prejudice to the rights of the holders of shares issued upon special conditions. Part only of the original capital of 200,000 shares had been issued—namely, 75,000 ordinary shares. At a directors' meeting on January 24, 1902, it was decided to create an issue of 50,000 5 per cent. preference shares, and resolutions were duly passed and confirmed at extraordinary general meetings creating this issue. Only 25,950 of these preference shares were taken up, entitling the holders thereof to a fixed cumulative preferential dividend at the rate of 5 per cent. per annum on the amount for the time being paid up thereon in priority to the ordinary shares, but not conferring any priority as regards capital.

The company carried on its business successfully until March 18, 1925, when a disastrous fire occurred on the premises. In consequence of this fire the company recovered 71,568*l.* from insurance companies in respect of the buildings, 81,500*l.* for the contents of the same, and 17,335*l.* for loss of profits. A sale of the site of the premises and the goodwill of the business was also effected with the view to the formation of a new company to be called Madame Tussaud (1926), Ld. On August 30, 1926, the company went into voluntary liquidation, and G. R. Freeman was appointed liquidator.

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All the debts of the company had been paid and the whole of the capital of 100,950*l.* made good to the different shareholders, and there remained surplus assets to the amount of nearly 70,000*l.* The liquidator desired to obtain the decision of the Court how he should distribute these surplus assets.

Accordingly on January 24, 1927, he issued an originating summons asking (inter alia): (1.) upon what principle the assets ought to be distributed between the holders of preference and of ordinary shares, and in particular (*a*) whether, having regard to the terms upon which the preference shares were issued, or otherwise, the capital assets of the company remaining after payment off of the whole of the capital paid up on the preference and ordinary shares were distributable amongst all the members of the company in proportion to the shares held by them, whether preference or ordinary, or whether such assets belong exclusively to the holders of ordinary shares; (*b*) if such capital assets were distributable amongst all the members of the company, whether profits made before the winding up but not distributed by way of dividend and the assets now representing the same, were now distributable amongst all the members of the company in manner aforesaid as part of such capital assets, or whether the undistributed profits and the assets now representing the same belong exclusively to the holders of ordinary shares. (2.) How deposit interest or other income derived since the winding up from surplus assets, ought to be dealt with as between the holders of preference and ordinary shares, and whether such interest should be treated as capital or income.

Sir T. Hughes K.C. and *Rawlence* for the liquidator stated the facts and the questions raised.

Jenkins K.C. and *R. G. Nicholson Combe* for the preference shareholders of the company. Prima facie there should be a division of the surplus assets among all the contributories according to the amount paid up on their shares respectively. "Surplus assets" is not a technical phrase, it simply means the assets remaining after all the creditors have been paid

and costs have been satisfied. When there are different classes of shareholders and diverse interests it may be that it will be decided according to the articles of association how the preference or other shares are to be dealt with, but in the case of a voluntary winding up it is not permitted to dissect the assets to see whether the property goes to one class of shareholders as distinct from another. There are only two reported cases where the Court has held that you can dissect the assets under such circumstances as exist here: *In re Bridgewater Navigation Co.* (1) and *Bishop* v. *Smyrna and Cassaba Ry. Co.* (2) The general rule is that the Court will not dissect profits. In the present case under the articles there was power to issue preference shares, and that was done in 1902 by two special resolutions, and these preference shareholders are entitled to a 5 per cent. dividend in priority to the ordinary shares. Under art. 130 (15.) power was given to the directors to set aside reserve funds out of profits, which was done, and money was placed on deposit. By art. 131 the profits were divisible among the members in proportion to the amount paid up, but always subject to the rights of members entitled to shares issued upon special conditions. That is really in common form. Art. 164 throws some light upon the principle to be applied, for it provides that if there is an insufficiency of assets in a winding up the loss is to be borne equally by all the shareholders, and the same principle should be applied when there is a surplus of assets. In the *Bridgewater* case (3) there were special terms under the articles 84 and 85 by which the whole surplus was to " belong to " the ordinary shareholders. In *Bishop* v. *Smyrna and Cassaba Ry. Co.* (2) the *Bridgewater* case (3) was applied and referred to before Kekewich J. They also referred to *In re Crichton's Oil Co.* (4), where the same two cases were considered and distinguished. The Master of the Rolls there deals with the distribution of surplus assets after all outside claims have been satisfied,

(1) [1891] 1 Ch. 155; [1891] 2 Ch. 317.
(2) [1895] 2 Ch. 265.
(3) [1891] 2 Ch. 317.
(4) [1901] 2 Ch. 184; [1902] 2 Ch. 86.

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and held that they must be divided rateably among all the shareholders.

Vaisey K.C. and *Bonner* for the ordinary shareholders. The whole of these surplus assets, being in the nature of "profits of the company" which have not been distributed, belong exclusively to the ordinary shareholders. The words in the articles 84 and 85 in the *Bridgewater* case (1) are very similar to those in the present case. Art. 84 in that case was similar in terms to art. 130 (15.) of the present case, while in art. 85 the words are "shall belong to" the holders of the shares of the company and be divided pro rata upon the whole paid up capital, whereas in the present case by art. 131 the profits of the company "are divisible amongst the members"; and in order to be divisible they must "belong to" them. There is no real distinction between the two cases. The right of the preference shareholders is limited to the fixed 5 per cent. dividend and has priority over the ordinary shareholders to that extent. Art. 132 is mere machinery and does not give any rights. In art. 133 the words are very general, "the profits of the company," and these surplus assets are in the nature of profits of the business of the company. The case is governed by the *Bridgewater* case (1), which it is submitted should be followed. If an ordinary trust fund is directed to be divisible amongst a certain class of beneficiaries it means that it belongs to them and is to be divided amongst them. Art. 131 contains a direct statement as to the persons between whom the "profits of the company" are to be divided, and these are "profits."

EVE J. This company was incorporated on February 27, 1889, with a capital of 200,000*l.* in 1*l.* shares, and by the memorandum it was provided that the original shares and also any increases of capital might be issued as preferential or guaranteed or deferred shares. Some portion of the capital was applied in the purchase of the undertaking which the company was promoted to acquire, and there were issued and fully paid up 75,000 of the original 200,000 shares. In

(1) [1891] 2 Ch. 317.

1902 the company resolved that 50,000 of the unissued shares should be issued as preference shares entitling the holders to a fixed cumulative preferential dividend of 5*l.* per cent. in priority to the ordinary shares, but not conferring any priority as regards capital. These shares were subscribed for to the number of 25,950, and from that time forward the capital of the company was 100,950*l.*, divided into 75,000 ordinary and 25,950 preference shares, all fully paid.

The company continued to carry on its business with success down to March, 1925, when practically the whole of its premises and their contents were unfortunately destroyed by fire. But provision had happily been made against the disastrous losses incident to such a catastrophe, and the company ultimately recovered from its insurers and realized from the sale of the site of its premises and from such of the other assets as had not been involved in the fire sufficient money to discharge all its debts, to refund all its capital, and to leave in the hands of the liquidator a sum amounting to close upon 70,000*l.* available for distribution amongst the persons interested in the shareholdings of the company.

The question has now arisen how, as between the preference and ordinary shareholders, this surplus ought to be distributed. By the contract between the company and the preference shareholders the latter, so long as the company was a going concern, were entitled to their preferential dividend; but on the winding up this preference was determined and thenceforward the 25,950 preference shares retained no preference or priority over the 75,000 ordinary shares. Prima facie, this state of things raises a presumption in favour of equality of distribution of any surplus assets amongst all the shareholders—preference and ordinary alike; but this presumption is of course subject to any special contract between the holders of different classes of shares, and it is argued on behalf of the ordinary shareholders that according to the constitution of the company regulating the rights of the two classes of shareholders inter se the preference shareholders having now been repaid their capital with 5 per cent.

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interest thereon have no further interest in the assets of the company.

The articles mainly relied upon in support of this contention are art. 130 (15.), whereby the directors are empowered, before recommending any dividend, to set aside out of profits such sums as they may think fit as a reserve fund against contingencies, and art. 131, which provides that subject to the rights of members entitled to shares issued upon special conditions the profits of the company shall be divisible among the members in proportion to the amount paid up on the shares held by them respectively.

It cannot, I think, be disputed that these surplus assets are profits of the company, and equally so whether the surplus represents excess of receipts over payments in previous years accumulated as reserve funds for particular or general purposes, but never so applied, or whether it is derived from the realization of the company's property at prices in excess of the value placed upon it in the company's books and accounts. This conclusion is in accord with the judgment of the Court of Appeal in the *Bridgewater Navigation Co.'s* case: see per Lindley L.J. (1)

The question whether the ordinary shareholders can successfully assert their claim to the surplus to the exclusion of the preference shareholders involves the construction of art. 131.

Is it merely effective to secure that, subject to the rights of any particular class or classes of shareholders, the division of profits shall be made amongst the members in proportion to the amount paid up on their shares and not in proportion to the shares held, irrespective of the amount paid up thereon, or does it operate to confer on the ordinary shareholders a right to all the profits that remain after the particular class, the preference shareholders, have been paid capital and preferential interest?

If the former construction be the right one the surplus will be divisible amongst all the members; the latter construction, on the other hand, will bring the case within the

(1) [1891] 2 Ch. 329.

mischief of the *Bridgewater* judgment (1), whereby it was held that the whole surplus belonged under the articles to the ordinary shareholders. In that case there was an article (art. 84), corresponding substantially with art. 130 (15.) here, but in the next following article—85—there were introduced words not to be found in the article—131—I have now to construe. Art. 85 provided that subject to the directors' powers under art. 84, and to another contingency I need not refer to, the entire net profits of each year should "belong to the holders of the shares of the company, and be divided pro rata upon the whole paid up share capital of the company."

Upon these articles the Court of Appeal held that all undrawn profits—whether represented by accumulated and disclosed reserves or by under-estimated value of assets, only revealed on realization—belonged to the ordinary shareholders only, on the grounds that if they had been drawn they must have been paid to the ordinary shareholders, that they were retained undrawn from motives of prudence, and that when on the sale of the company's undertaking and the winding up of the company the motive for retaining them ceased to exist, they must still be regarded as belonging to those shareholders who would have received them had they been distributed when earned.

But the difference between art. 85 and the one I am called upon to interpret is abundantly apparent. In the former not only is the right to the profits of each year declared but, subject to the exercise of the powers conferred upon the directors by art. 84, the direction to distribute is imperative. In art. 130 no such corresponding declaration or direction are to be found—only what is in substance a stipulation as to the basis upon which any division of profits is to be made.

I cannot impress upon the article the construction contended for by the ordinary shareholders, nor can I extract from it any such contract as they suggest. I do not think the article operates to exclude the preference shareholders from

(1) [1891] 2 Ch. 317.

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sharing in this surplus. This conclusion is, I think, supported by art. 164, on which Mr. Jenkins not unnaturally relied: "If the company shall be wound up and the surplus assets" —that means the assets after payment of the liabilities and the costs of winding up—"shall be insufficient to repay the whole of the paid up capital, such surplus assets shall be distributed so that as nearly as may be the losses shall be borne by the members in proportion to the capital paid up, or which ought to have been paid up, on the shares held by them respectively at the commencement of the winding up." The effect of which is that if this company, instead of being possessed of this very satisfactory surplus, had been left with an equivalent deficit, the preference shareholders would have been called upon to bear their aliquot proportion of that deficit. On the whole I have come to the conclusion that according to the constitution of the company the rule ought to obtain by which these surplus assets, including deposit interest, should be distributed amongst all the shareholders pro rata in proportion to the amount paid up on their shares.

Solicitors: *E. F. & H. Landon.*

G. M.

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[1926. B. 2555.]

Goodwill—Partnership—Death of Partner—Sale of deceased Partner's Interest under Articles—Solicitation by Executor of deceased Partner—Injunction.

The rule laid down in *Trego* v. *Hunt* [1896] A. C. 7, that a vendor of the goodwill of a business is not entitled to solicit its customers extends to a vendor's executors carrying out a contract for the sale of the goodwill, and the executor will be restrained at the suit of the purchaser from soliciting customers of the business.

Where therefore a deed of partnership provided that on the death of a partner the surviving partner should acquire the deceased partner's share of the capital property and assets of the partnership business, or alternatively that the surviving partner might elect to have the whole of the assets of the partnership realized and divided, an injunction was granted at the instance of the surviving partner to restrain an executor of the deceased partner from soliciting customers of the firm.

The principles of the rule laid down in *Trego* v. *Hunt* [1896] A. C. 7 discussed.

MOTION.

From the year 1894 the plaintiff Thomas Boorne and John Wicker carried on business in partnership, under the style of Boorne & Co. as brewers at the Wallington Brewery, and since 1921 this partnership has been carried on under and subject to the terms of a deed of partnership dated May 17, 1921.

John Wicker died on March 25, 1926, having by his will appointed his wife Mercy Wicker and the three defendants, Edith May Wicker, John Wicker and James Bruce Wicker, to be his executors. Mercy Wicker predeceased her husband, and probate of John Wicker's will was granted on September 13, 1926, at the Principal Probate Registry to the defendants, John Wicker and James Bruce Wicker, Edith May Wicker having renounced probate.

Clause 14 of the deed of partnership provided: "If either party shall die during the partnership thereupon his executors or administrators shall be entitled to his share of the profits and income of the partnership up to the date of his death to become payable three calendar months after such death and a proper and ample valuation shall be made of the whole

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capital property and assets belonging to the partnership on the day of the death of such deceased partner and the executors or administrators of such deceased partner shall be entitled to a sum equal to a moiety of such valuation as being the share of such deceased partner in the capital property and assets of the partnership and the surviving partner shall within 12 calendar months next after the death of the deceased partner pay the said sum to the executors or administrators of the deceased together with interest thereon in the meantime at the rate of 6 per cent. per annum unless some other arrangements shall have been made as provided by the clause next following."

Clause 15 provided: "Upon the determination of the partnership by the death of a partner unless either of the following modes shall be mutually agreed upon between the surviving partner and the executors or administrators of the deceased partner, i.e.,

(*a*) That such executors or administrators will continue the partnership with the surviving partner . . . . or

(*b*) That the whole of the business and assets of the partnership shall be sold or transferred to a limited liability company in exchange for such shares debentures or other securities as may be mutually determined, it shall be competent for the surviving partner by notice in writing to be given by him within four calendar months after the death of the partner who may first die to the executors or administrators of such deceased partner to elect

(*c*) That the assets of the partnership shall be realised and divided in manner provided by clause 13 thereof."

Clause 13 provided: "Upon the determination of the partnership otherwise than by the death of a partner a full and general account of the assets and liabilities and transactions of the partnership shall be taken and the assets and property thereof, including the goodwill of the said business shall with all convenient speed be realised and sold and the debts due to the partnership got in and the proceeds shall be applied in discharge of the liabilities of the partnership and the expenses of liquidating the same and realising the

assets thereof and in the next place in payment to each partner of any profit coming to him and of his share of the capital and the surplus if any of the moneys realised as aforesaid shall be divided between the parties."

Disputes having arisen between the parties an action was commenced by the plaintiff on June 18, 1926, claiming specific performance of the agreement contained in the partnership deed for dealing with the share of a deceased partner. On January 18, 1927, an order was made by consent in the following terms (so far as material) :—

"The plaintiff and the defendants by their counsel consenting to this judgment and agreeing that the articles of partnership dated May 17, 1921 . . . . in the pleadings mentioned ought in the circumstances which have arisen to be specifically performed so far as regards paragraphs 14 and 15 of the said articles and that the person or persons to be appointed under the provisions hereinafter contained shall be at liberty in the event of questions being raised to make his report in such alternative form as will enable the questions to be decided by the Court and further agreeing that the four calendar months referred to in paragraph 15 (*b*) of the said articles of partnership shall be taken to be extended to one month after that of the valuation to be made by the said person or persons to be appointed. This Court doth order that failing agreement between the parties a proper person or persons be appointed in Chambers :—

(1.) to ascertain the share of the said John Wicker deceased of the profits and income of the partnership up to the date of his death

(2.) to make a proper and ample valuation of the whole capital property and assets belonging to the partnership on the day of the death of the said John Wicker . . . . And the parties are to be at liberty to apply."

The defendant James Bruce Wicker had been employed in the partnership business as clerk and traveller from 1905 until after John Wicker's death ; but on October 21, 1926, the plaintiff dismissed him without previous notice. There had never been any written agreement as to his employment,

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and there was no condition expressed or implied that on the termination of his services he should be restricted from canvassing customers of the business.

After his dismissal the defendant obtained employment with a brewery company, and had since then canvassed a number of customers of the firm of Boorne & Co.

The plaintiff now moved in the action to restrain the defendant James Bruce Wicker from canvassing or soliciting any of the customers or former customers or persons who have dealt with the business carried on at the Wallington Brewery or from making any statements or representations in reference to the business or otherwise depreciating or interfering with the sale of business pursuant to the judgment dated January 18, 1927, or the ascertainment of the value thereof pursuant to that judgment.

Gavin Simonds K.C. and *F. Whinney* for the plaintiff. The defendant James Bruce Wicker is in the position of a vendor depreciating the assets that are being sold by soliciting the customers of the business. He is not entitled to do this to the prejudice of the plaintiff and of his testator's estate: *In re David and Matthews' Arbitration.* (1) Under the material clauses of the partnership deed either the plaintiff will purchase the testator's share of the goodwill and assets or the whole goodwill and assets will be sold to a third party. In either case the plaintiff is entitled to prevent an executor of the testator from depreciating their value by soliciting customers of the business: *Trego* v. *Hunt.* (2)

Grant K.C. and *F. Baden Fuller* for the defendant James Bruce Wicker. This motion has been brought in an action in which judgment has already been given. It is not a proceeding that can properly be brought under the liberty to apply, and is misconceived. This forms a preliminary objection to this motion. But apart from this, this motion ought to fail. This defendant is not under any restraint from canvassing customers of the business. There was no written agreement or covenant in connection with his employment

(1) [1899] 1 Ch. 378. (2) [1896] A. C. 7.

to prevent his doing so. It is true that the defendant is also an executor of the deceased partner, and in that capacity becomes under the partnership deed a vendor of the deceased partner's share of the business, but this will not prevent him in his capacity of a dismissed servant accepting employment by a rival firm and soliciting the customers of the partnership business.

But in any case the rule in *Trego* v. *Hunt* (1) does not apply to any case of a compulsory sale. Here the defendant is bound owing to the act of his testator to sell. As executor he has to give effect to clauses 14 and 15 of the partnership deed. His obligation is to implement his testator's contract: Lindley on Partnership, 9th ed., p. 536. It is a sale by him in invitum, and *Trego* v. *Hunt* (1) has no application: *Walker* v. *Mottram* (2); *Green & Sons (Northampton), Ld.* v. *Morris* (3); *In re Irish.* (4) There are passages in both *Trego* v. *Hunt* (1) and *Walker* v. *Mottram* (2) which make it clear that the principle on which the rule in *Trego* v. *Hunt* (1) is based is that a person who has voluntarily contracted to sell his business and will put the purchase money in his pocket ought not to be allowed to damage what he has sold by soliciting customers of the business. Here the executors are not the vendors, but are merely the persons to execute the conveyance giving effect to their testator's contract. It would be an injustice if merely because a man became the executor of a deceased partner he should be deprived of his liberty to solicit customers of the business. He might conceivably be the owner of a competing business. This case is outside the rule in *Trego* v. *Hunt* (5) and is a case of the character of *Walker* v. *Mottram* (2) and *Green & Sons (Northampton), Ld.* v. *Morris.* (3)

F. Whinney in reply. The rule in *Trego* v. *Hunt* (5) applies. Until that case was determined the question of soliciting was in a state of flux: *Gillingham* v. *Beddow.* (6) It is now well settled, and rests on the principle that a vendor must

(1) [1896] A. C. 7, 17, 30.
(2) (1881) 19 Ch. D. 355, 363.
(3) [1914] 1 Ch. 562.
(4) (1888) 40 Ch. D. 49.
(5) [1896] A. C. 7.
(6) [1900] 2 Ch. 242, 244.

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not depreciate the value of what he is selling. The executors here stand in the shoes of the deceased partner: *In re David and Matthews' Arbitration.* (1) In *Walker* v. *Mottram* (2) and *Green & Sons (Northampton), Ld.* v. *Morris* (3) the debtor was not the vendor, but in the one case his trustee in bankruptcy and in the other the trustee of a deed of assignment for the benefit of creditors executed by him and his partners. *In re Irish* (4) is an entirely different case, and has no bearing on this case.

TOMLIN J. This is a motion made in somewhat unusual circumstances. The plaintiff in the action and one John Wicker were partners in the business of brewers at Wallington in Surrey, under articles of partnership dated May 17, 1921. The beginning of the partnership was not the birthday of the business, which had been carried on for many years. On March 26, 1926, John Wicker died, and the defendants, John Owen Wicker and James Bruce Wicker, are his personal representatives. Under the partnership articles provisions are made as to the disposition of the business on the death of any partner under which the surviving partner has a right for a certain period to elect to take over the business upon terms. Otherwise, it may be that the assets have to be realized.

A dispute arose between the plaintiff and the defendants, whether the plaintiff had not forfeited his right to elect owing to his failure to take the necessary steps under the partnership articles; and this action was commenced on June 18, 1926. The statement of claim, the defence and a reply were put in, but ultimately the action came before me as a short cause upon motion for judgment upon agreed minutes. Agreed minutes do not always produce a satisfactory order. I do not think they did in this case. But the substance of the order, which was dated January 18, 1927, was this. [His Lordship read the order as set out above.]

I may say at once that that order, in my view, is an order under which it is the duty of the person appointed in chambers

(1) [1899] 1 Ch. 378, 382.
(2) 19 Ch. D. 355.
(3) [1914] 1 Ch. 562.
(4) 40 Ch. D. 49.

to report to the Court the result of the inquiries which he is directed to make, and that upon the report the parties are free to apply, so that the matter can be ultimately disposed of in Court. In other words, I think that the Court is in a position to enforce specific performance of the contract contained in clauses 14 and 15 of the articles of partnership, and that the defendants have submitted to have those articles given effect to by the Court. That is the effect, in my judgment, of the order.

I consider, therefore, that I have complete seisin of this action, and that if I find there is any party to the suit who is doing something that is contrary to the essentials of the matter—that is to say, destroying any of the property which is the subject-matter of the inquiry or valuation to be made—I have ample jurisdiction to interfere and protect the property.

This motion is made in the following circumstances. One of the defendants, James Bruce Wicker, was in the employment of the firm. He seems to have had differences with the firm, and he was dismissed—he alleges wrongfully—and proceedings are pending in the King's Bench Division for damages for wrongful dismissal. That is a matter which will be determined in due course in those proceedings. Having been discharged, wrongfully, as he says, he has joined some one else in business, and has commenced to solicit the customers of the firm. He is therefore in this position. On the one hand he has entered into no covenant restraining him from soliciting the customers of the business; on the other hand, he is an executor of John Wicker, bound to give effect to his testator's contract, and the plaintiff alleges that as such he is bound not to do anything to depreciate the property which he is selling. The question is whether that is his position as the result of his being an executor of the deceased partner.

I have been referred by Mr. Grant on his behalf to a number of authorities in support of the proposition that the well known rule in *Trego* v. *Hunt* (1) preventing the vendor

(1) [1896] A. C. 7.

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of a business from soliciting customers of the business is a rule which applies only where the person alleged to be wrongfully soliciting is the vendor who voluntarily entered into the contract of sale and is putting the proceeds into his own pocket. He says that it does not apply to a man whose property has been sold compulsorily by the operation of the law, as in the case of a man who has been made bankrupt and whose trustee has sold his property. And as to this he is right; there is authority for that. He contends that it does not apply to a man who is only fulfilling, as personal representative, the contract of his testator. He agrees that it might apply where an executor himself entered into the contract or, possibly, though I am not sure that he goes as far as this, where an executor had acquired knowledge of the business which enabled him to solicit. His argument is based upon the theory that this rule against solicitation by a vendor is confined strictly to the case where the man who completes the contract is the original vendor who has personal knowledge of the affairs of the business that he has sold voluntarily, and has put, or is going to put, the proceeds of the sale into his own pocket.

Apart from *Trego* v. *Hunt* (1) the cases to which I have been referred seem to carry the matter very little further. *Walker* v. *Mottram* (2) is the case where a bankrupt's property was sold by his trustee in bankruptcy, and it was held that the bankrupt could not be prevented from soliciting customers. That case does not seem to me of much assistance, though there are, it is true, passages in the judgment to which Mr. Grant referred, which, as he says, indicate that the voluntary nature of the transaction and the benefit arising from it to the vendor are essential elements in the reasons for the application of the rule in *Trego* v. *Hunt*. (1) Again, in *Green & Sons (Northampton), Ld.* v. *Morris* (3), it was held that the original owner of property assigned to a trustee for the benefit of creditors was not subject to the rule, because in that case also the sale was made against his will. *In re Irish* (4) is

(1) [1896] A. C. 7.
(2) 19 Ch. D. 355.
(3) [1914] 1 Ch. 562.
(4) 40 Ch. D. 49.

a case which affords me no assistance at all. The question was whether, on a sale under the Court, the contract, which had already been entered into, ought to be modified by inserting covenants preventing the receiver appointed by the Court from soliciting orders from or doing business with the present customers. It seems to me that all that case decided was that there was no general rule which applied, that the receiver was not the vendor, that it was not right to depart from the contract, and that there was no ground for imposing such a restriction on the receiver.

Trego v. *Hunt* (1) for the first time laid it down definitely that a vendor of a business ought to be restrained from soliciting customers of the business, overruling *Pearson* v. *Pearson* (2) and supporting the reasoning in *Labouchere* v. *Dawson*. (3) But the learned Lords in that case seem to have left open the question what was the precise principle upon which the rule was based and what were the precise cases to which it applied. They held that it applied to that particular case which was the simple case of a vendor entering into a contract for sale and himself completing the sale; but if Mr. Grant is right there are a number of cases—of which this present case is one—to which the principle does not apply.

In default of other light, I myself must choose a principle on which to base the doctrine. I think I am bound to rest upon what was said by Lord Macnaghten in *Trego* v. *Hunt* (1): "The principle on which *Labouchere* v. *Dawson* (3) rests has been presented in various ways. A man may not derogate from his own grant; the vendor is not at liberty to destroy or depreciate the thing which he has sold; there is an implied covenant, on the sale of goodwill, that the vendor does not solicit the custom which he has parted with; it would be a fraud on the contract to do so. These, as it seems to me, are only different turns and glimpses of a proposition which I take to be elementary. It is not right to profess and to

(1) [1896] A. C. 7, 25. (2) (1884) 27 Ch. D. 145.
(3) (1872) L. R. 13 Eq. 322.

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purport to sell that which you do not mean the purchaser to have; it is not an honest thing to pocket the price and then to recapture the subject of sale, to decoy it away or call it back before the purchaser has had time to attach it to himself and make it his very own."

Where a man has entered into a contract for the sale of a business which it falls to his executor to complete, in my judgment the executor who, on completion of the contract, proceeds to solicit the customers of the old firm is doing the very thing which is indicated in those words of Lord Macnaghten. He may or may not have actual knowledge of who the customers of the firm are, though he certainly has every opportunity of ascertaining them, but whether or not he has actual knowledge of them, it seems to me to be against common honesty that he should be free at one and the same time to complete his testator's contract and to snatch away from the purchaser the property which he is affecting to convey to him.

In what terms the principle is to be framed is another matter, but I am satisfied that in a case such as this there is no justification for an executor at one and the same time completing the contract and destroying the subject-matter of it. Still less does his conduct find favour in my eyes when I know that he has in fact, or may in fact, have acquired knowledge of the business by reason of the position which he himself in the past held in it. In the circumstances I think it is right that, at any rate while the matter is under the hand of this Court, and while inquiries and valuations are proceeding for the assistance of this Court, the subject-matter of those inquiries and valuations should not be destroyed by the conduct of one of the defendants to the action.

I propose therefore on this application to grant an injunction to restrain the defendant from soliciting the customers of the firm until the report required by the order has been presented to the Court and the matter has again been brought before the judge in person or until further order. When the matter comes up for ultimate settlement, then

it can be finally dealt with and the differences between the parties ultimately adjusted. The costs will be costs in the action.

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Solicitors: *Gresham, Davies & Dallas; Withers & Co.*

H. C. G.

In re COLYER'S FARNINGHAM ESTATE.

TOMLIN J. 1927 *March* 14.

[1926. C. 4584.]

Will—Tenants for Life of Land as Tenants in Common—Gift over to single Person subject to special Power of Appointment—Statutory Trusts—Settled Land—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 19, *sub-s.* 2—*Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *First Schedule, Part IV., para.* 1 (3.)—*Law of Property (Amendment) Act*, 1926 (16 & 17 *Geo.* 5, *c.* 11), *Schedule.*

By the Schedule to the Law of Property (Amendment) Act, 1926, the following paragraph was added to the Law of Property Act, 1925, First Schedule, Part IV.: "Where, immediately before the commencement of this Act, there are two or more tenants for life of full age entitled under the same settlement in undivided shares, and after the cesser of all their interests in the income of the settled land, the entirety of the land is limited so as to devolve together (not in undivided shares), their interests shall, but without prejudice to any beneficial interest, be converted into a joint tenancy, and the joint tenants and the survivor of them shall, until the said cesser occurs, constitute the tenant for life for the purposes of the Settled Land Act, 1925, and this Act":—

Held, (1.) that in ascertaining whether the paragraph applies, regard must be had to the limitations of the settlement subsisting immediately before the commencement of the Act but not to any dealing with or devolution of the interest of any person taking under the limitations of the settlement;

(2.) that the paragraph only applies where the interests of the tenants for life are followed by a vested indefeasible limitation not in undivided shares.

Where, therefore, a testator by his will gave his residuary real estate to trustees upon trusts under which the property was immediately before January 1, 1926, held upon trust for two persons during their lives in undivided shares and subject thereto upon such trusts for the benefit of the testator's sons and grandsons as L. should by deed or will appoint and in default of and subject to any such appointment in trust for the testator's heir:—

Held, that the paragraph did not apply, but the property was vested in the trustees of the will upon the statutory trusts pursuant to the Law of Property Act, 1925, First Schedule, Part IV., para. 1 (3.).

ADJOURNED SUMMONS.

By his will dated July 28, 1879, Ernest Henry Colyer,

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after making certain specific and pecuniary bequests, gave all the residue of his real and personal estate to trustees upon trust to pay the legacies and annuities therein mentioned; and after disposing of his residuary personal estate the testator (by clause 12) directed that as to the residue of his real estate the clear income thereof should be paid or applied for the benefit of a class consisting of his wife (so long as she continued his widow) and his seven children and the survivors or survivor of them and declared that so long as there should be more than one member of the said class the said income should be divided among them in equal shares. The testator then gave the last survivor of his wife and his daughters Caroline Rosabella Miller, Julia Augusta Lucas, and Amy Emma Colyer power by deed or will to appoint his residuary real estate after the death of the surviving member of the above class to or in favour of any one or more of his sons or grandsons and if no such sons or grandsons should be living then in favour of any one or more of his daughters or granddaughters, such appointment to be in such manner and form and subject in all respects to such conditions limitations and provisions as such his wife or daughter should think fit. In default of and subject to any such appointment the testator directed that his residuary real estate should after the death of the survivor of the above class go and remain as if he had died intestate.

The testator died on June 22, 1887, and his will and a codicil which did not affect any of the material provisions of his will were duly proved. His residuary real estate consisted of houses and land in the parish of Farningham in the county of Kent.

Of the testator's seven children his eldest son Francis James Colyer predeceased him and died a bachelor on April 25, 1885, his daughter Caroline Rosabella Miller died on October 28, 1891, his daughter Laura Mildred Colyer died on January 24, 1916, his son Arthur Henry Colyer died on August 3, 1920, and his daughter Amy Emma Colyer died on January 2, 1923. The testator's widow died on April 9, 1909.

The result was that on January 1, 1926, the only survivors of the class, consisting of the testator's widow and seven children, were Mary Anne Lansdell and Julia Augusta Lucas; that the power of appointment (which had not yet been exercised) was exercisable by Julia Augusta Lucas as the survivor of the four persons named in the will.

The testator's heir at law, Arthur Henry Colyer, by his will dated May 17, 1920, after appointing executors, recited the devise in his favour as heir at law contained in the will of the testator, and gave and devised all real estate or proceeds of sale of real estate to which he might become entitled under the testator's will either in default of appointment or by virtue of any appointment to (in the events which happened) his three children in equal shares as tenants in common. Arthur Henry Colyer's executor had not yet assented to this devise, as the personal estate had proved insufficient to pay the debts of their testator.

This summons was taken out by the existing trustees of the testator's will asking whether, having regard to the limitations and provisions affecting the real estate contained in the testator's will and to the provision concerning such estate contained in Arthur Henry Colyer's will and in the events which had happened, Mary Anne Lansdell and Julia Augusta Lucas were tenants for life of the said will within the meaning of the Settled Land Act, 1925, or persons having the powers of a tenant for life and therefore entitled to require the execution of a principal vesting deed in their favour as joint tenants in respect of the settled estate.

Lyttelton Chubb for the trustees. Prima facie this case falls within the Law of Property Act, 1925, First Schedule, Part IV., para. 1 (3.), and the estate vested on January 1, 1926, in the trustees upon the statutory trusts. It is suggested, however, that para. 4, which was a new paragraph passed by the Law of Property (Amendment) Act, 1926, Schedule, applies and that the two life-tenants must be treated as entitled as joint tenants so as to make them together the tenant for life of the settled land under the Settled Land Act,

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1925, s. 19, sub-s. 2. It is for the tenants for life to establish that para. 4 applies notwithstanding that the limitation to the heir at law was defeasible upon any exercise of the special power of appointment and that under the heir at law's will the property was devised to three persons as tenants in common. There is perhaps less weight in the second point, because the executors of the heir at law's will have not assented to the devise; but it cannot be said that upon the cesser of the life interests "the entirety of the land is limited so as to devolve together (not in undivided shares)," seeing that by an exercise of the overriding special power of appointment it may be made not to do so.

Sanger for the tenants for life. For the purpose of applying para. 4 the facts on January 1, 1926, and not on any later date must be taken into account. Further in applying para. 4 regard must be had only to the limitations of the settlement, and any subsidiary dealings or devolution of interests under those limitations are immaterial. If this were not so, it would be practically impossible to put any useful meaning on para. 4. Lastly, regard ought not to be had to a power which has not been exercised. Under the limitations as they existed on January 1, 1926, the entirety of the property was limited so as to devolve together and not in undivided shares. Regard ought not to be had to what might happen in the future.

[TOMLIN J. Have you not got to show that on January 1, 1926, the conditions of para. 4 were necessarily complied with?]

It is submitted not. It is immaterial that the limitation to the heir at law was liable to be defeated by an appointment under the special power. On that date nothing had been done to defeat it, so that as matters stood the entirety of the land was limited so as to devolve together after the cesser of the life interests. It is suggested that this is sufficient to bring the present case within para. 4.

TOMLIN J. [after stating the facts:] In these circumstances the question I have to determine is whether the power

to sell the property is now vested in the trustees of the will or in the tenants for life.

Under the Settled Land Act, 1925, s. 19, sub-s. 2, "if in any case there are two or more persons of full age so entitled" (that is, beneficially entitled under a settlement to possession of settled land for life) "as joint tenants, they together constitute the tenant for life for the purposes of this Act." Under the Law of Property Act, 1925, First Schedule, Part IV., para. 1, as amended by the Law of Property (Amendment) Act, 1926, Schedule: "Where immediately before the passing of this Act, land is held at law or in equity in undivided shares vested in possession, the following provisions shall have effect: . . . . (3.) If the entirety of the land is settled land (whether subject or not to incumbrances affecting the entirety or an undivided share) held under one and the same settlement, it shall, by virtue of this Act, vest, free from incumbrances affecting undivided shares, and from incumbrances affecting the entirety, which under this Act or otherwise are not secured by a legal mortgage, and free from any interests, powers, and charges subsisting under the settlement which have priority to the interests of the persons entitled to the undivided shares, in the trustees (if any) of the settlement as joint tenants upon the statutory trusts. . . . ." Then by virtue of the Law of Property (Amendment) Act, 1926, Schedule, the following new paragraph is to be read in at the end of para. 3 of this Part of the Schedule: "4. Where, immediately before the commencement of this Act, there are two or more tenants for life of full age entitled under the same settlement in undivided shares, and after the cesser of all their interests in the income of the settled land, the entirety of the land is limited so as to devolve together (not in undivided shares), their interests shall, but without prejudice to any beneficial interest, be converted into a joint tenancy, and the joint tenants and the survivor of them shall, until the said cesser occurs, constitute the tenant for life for the purposes of the Settled Land Act, 1925, and this Act."

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It is plain on the construction of the testator's will that there are two persons interested as tenants for life in undivided shares, and therefore this case is not prima facie within the Settled Land Act, 1925, s. 19, sub-s. 2. The question is whether the trusts of this settlement immediately before the coming into force of the Law of Property Act, 1925, were such as to convert the tenancy in common of the tenants for life into a joint tenancy, and thereby constitute them the tenant for life for the purposes of the Settled Land Act, 1925. For the purpose of answering this question it becomes necessary to examine the language of the new para. 4. It is clear that the condition is here fulfilled of there being "immediately before the commencement of this Act . . . . two . . . . tenants for life of full age entitled under the same settlement in undivided shares." The question is whether the next few words apply: "and, after the cesser of all their interests in the income of the settled land, the entirety of the land is limited so as to devolve together (not in undivided shares)." I suspect that what is really meant by these words is: "and the entirety of the land is limited so as to devolve together (not in undivided shares) after the cesser of all their interests in the income of the settled land." In other words I think it has to be determined whether at the commencement of the Act, and not whether after the cesser of the interests of the tenants for life, the entirety of the land was limited so as to devolve together.

The question that first arises is whether the limitations are to be ascertained in regard only to the actual limitations of the settlement or in regard to any number of subsidiary interests that may have arisen. The answer, I think, is that regard must be had only to the limitations of the settlement, irrespective of what the persons taking under these limitations have done with their shares. Therefore I must look at the settlement to see what immediately before the commencement of the Act were the limitations to take effect on the cesser of the life interests; and in this way ascertain whether the entirety of the land was limited on such cesser so as to devolve together.

In order to bring the case within the new para. 4, it must, I think, be shown that the land is limited so as necessarily, if the limitation takes effect, to pass as an entirety. I do not think that this can be said of a limitation in default of appointment. The land may pass under the limitation in default of appointment, but it is a defeasible limitation, and by the exercise of the power of appointment the land may (for all I know) be limited so as to devolve in undivided shares. Moreover the power is a special power, and if it be exercised, the limitations so created have to be read into the settlement.

Therefore I have come to the conclusion that when land is limited to a single person subject to a special power of appointment, it cannot be said that "the entirety of the land is limited so as to devolve together (not in undivided shares)." I think that those words are not satisfied, unless the life interests are followed by a vested indefeasible limitation not in undivided shares, and that here that element is not present.

I feel sympathy with tenants for life of considerable property who find themselves deprived of its management, but I can only have regard to the actual words of the Act and put the best construction I can on them.

I will declare that the respondents have not the powers of a tenant for life and that the land has become vested in the trustees of the testator's will upon the statutory trusts.

Solicitors: *Pettitt & Ramsay.*

H. C. G.

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PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET, LONDON, W.C. 1.

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